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Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 960335-CA

IN THE UTAH COURT OF APPEALS

AMERICAN RURAL CELLULAR, INC.,
a Delaware corporation,

Plaintiff/Appellant,

vs.

Case No. 960335-CA

Priority 15

SYSTEMS COMMUNICATION CORPORATION, a Utah corporation, and NEAL M. SORENSEN, an individual,

Defendants/Appellees.

# BRIEF OF PLAINTIFF-APPELLANT AMERICAN RURAL CELLULAR, INC.

Appeal from Final Order of the Eighth Judicial District Court
in and for Uintah County
The Honorable John R. Anderson, District Judge

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## JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2A-3(2)(j) (1996). As the final judgment of the Eighth Judicial District Court, this appeal is taken as of right pursuant to Rules 3 and 4 of the Utah Rules of Appellate Procedure.

## ISSUES PRESENTED FOR REVIEW

1. Did the Court err in holding that Syscom was not a contractor under the Utah Construction Trades Licensing Act, and was therefore not barred from suing for materials and services?

STANDARD OF REVIEW: This legal determination is reviewed for correctness. Jones, Waldo, et al. v. Dawson, 298 Utah Adv. Rep. 8, 11 (Utah 1996). (Issue preserved for review at R. 959.)

2. Did the Court err in refusing to find that Syscom had breached various material duties and obligations under the Management Agreement, and was therefore not entitled to recover?

STANDARD OF REVIEW: This legal determination is reviewed for correctness. Jones, Waldo, et al. v. Dawson, 298 Utah Adv. Rep. 8, 11 (Utah 1996). (Issue preserved for review at R. 959.)

3. Did the Court err in finding that Cellcom had breached the Management Agreement by failing to communicate with Syscom?

STANDARD OF REVIEW: This finding of fact is reviewed under the clearly erroneous standard. Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372, 1378 (Utah 1995).

4. Did the Court err in refusing to reopen to consider additional evidence, or to order a new trial on the basis of its own legal error, or, as an additional ground, the discovery of additional evidence showing Syscom's breach caused Cellcom to suffer millions of dollars in damages?

STANDARD OF REVIEW: These decisions are reviewed for abuse of discretion. (Issue preserved for review at R. 1040, 1097.)

5. Did the Court err in refusing to recuse when his former firm's representation of Syscom in a transaction related to this lawsuit created the appearance of impartiality?

STANDARD OF REVIEW: This legal determination is reviewed for correctness. Jones, Waldo, et al. v. Dawson, 298 Utah Adv. Rep. 8, 10 (Utah 1996). (Issue preserved for review at R. 1051.)

## DETERMINATIVE STATUTES

Utah Construction Trades Licensing Act, § 58-55-101, et seq. (1995).

Utah Code Ann. § 78-7-1(1) (1953, as amended).

Utah Code of Judicial Conduct, Canons 2 and 3.

## STATEMENT OF THE CASE

This is a contract action arising from the construction of a cellular telephone system in eastern Utah. In 1989, American Rural Cellular ("Cellcom" or "ARC") had earned Federal Communications Commission ("FCC") permits to build cellular systems in eastern Utah (Utah-5), and in central Pennsylvania (PA-11). Cellcom hired Syscom to construct one Mobile Telephone Switching Office (MTSO), and two cell sites, each with a building, towers, access road, fencing and large antennae in eastern Utah. As the first phase of construction neared completion, Syscom

had expended all of the funds budgeted to construct the three sites and run the system for the ensuing nine months.

Cellcom asked Syscom to account for the monies spent, so that Cellcom could avoid default by accounting to its lender, Motorola. Syscom responded by filing three mechanic's liens claiming $89,000, plus attorney's fees. Cellcom filed this action for breach of contract, to terminate the contract, and to void the mechanic's liens. Syscom counterclaimed for more money it claimed was owing.

After a bench trial in October, 1992 the court held that: (1) Syscom had breached the contract but the breach was de minimis; (2) Cellcom was justified in terminating the contract but that no damages resulted to Cellcom; and (3) entered judgment on the Counterclaim, awarding Syscom its attorney's fees and a judgment for $116,040.96. Cellcom appealed.

The Court of Appeals reversed and remanded on the issue of whether Syscom was entitled to recover. American Rural Cellular Inc. v. Systems Communications Corp., et al., 890 P.2d 1035 (Utah App. 1995) (Cellcom I). Holding that the Court's Findings of Fact were woefully deficient and that its Conclusions of Law were in error, it reversed and remanded with detailed instructions.

Upon remand, the Court entered judgment on September 18, 1995, again holding that Syscom was not a contractor under the Utah Construction Trades Licensing Act and was entitled to recover from Cellcom. The Court added to the judgment amounts not awarded in the first judgment, added interest and increased the award of attorney's fees to Syscom.

Cellcom then learned that before Judge Anderson took the bench his two-person law firm had represented Syscom and its president, Rodney Hauer, in a stock purchase transaction related

to this lawsuit. Cellcom moved the Court to recuse itself. Cellcom also moved to reopen the case for the submission of additional evidence under Utah Rules of Civil Procedure 59, and in the alternative, moved for a new trial, on the basis of legal error and the discovery of new evidence of the numerous deficiencies in the work Syscom had performed, and the millions of dollars of consequential damages caused by Syscom's failure to account for the money it had expended. Syscom's breach lead to Cellcom's lender foreclosing on the PA-11 permit, property and assets.

The Court denied all Cellcom's motions, including the Motion to Recuse. This appealed followed.

## STATEMENT OF FACTS

1. In 1989, American Rural Cellular, Inc. (Cellcom) was awarded FCC construction permits to construct cellular systems in eastern Utah (Utah-5), and in central Pennsylvania (PA-11). (R. 531, 754.)

2. Cellcom was formed in the mid-1980's in order to pursue cellular telephone construction permits from the FCC. (R. 1368; Dennis O'Neill Aff., ¶ 3, attached to plaintiff's Memorandum of Law Supporting its Rule 59 Motions and therein offered; rejected by Court's Ruling, November 9, 1995; R. 1307.) To qualify for the construction permits Cellcom spent approximately $125,000 (of which $84,600 was for FCC filing fees) to demonstrate to the FCC that it was capable of constructing and operating a cellular telephone system. (Id. at ¶ 4.) Only after many months of endeavor to meet FCC standards did Cellcom qualify for the permit lottery. (Id. at ¶ 5.)

3. After obtaining a Utah Construction permit from the FCC, Cellcom approached Systems Communications, Inc. (Syscom) and negotiated a contract wherein Syscom would build and then help manage the Utah-5 system. (Ex.1, R. 532.)

4. Mr. Sorensen, President of Syscom, testified that "we were a telephone and radio company as well as we did a lot of other forms of technical, wireless communications. We built supervisory control and data acquisition. We built sites for ourselves and for others. We installed antennas, transmission lines, we did microwave radio communications point-to-point." (R. 552.)

5. No one at Syscom had any experience operating a cellular system. Mr. Sorensen was trained at Cellcom's expense to manage and maintain the technical aspects of the system. (R. 771.)

6. Syscom was not a partner of or a joint venturer with Cellcom. (R. 727.)

7. No officer, director or employee of Cellcom had any experience in the construction trades or construction business. (R. 546-47.)

8. Before contracting with Syscom, Cellcom negotiated with several equipment vendors, including Motorola, that offered to lend construction, equipment and operating funds to Cellcom; Cellcom chose Motorola. (R. 544.)

9. Cellcom's projects in Utah-5 and PA-11 were financed by Motorola, Inc. Before gaining financing, Cellcom had to submit, among other things, a detailed business plan to Motorola, including construction and operation costs. (R. 546-547.)

10. Cellcom asked Syscom to submit a complete and detailed bid for what it would cost to construct two cell sites and one MTSO. (R. 544, 545.) Cellcom told Syscom to be as specific as possible with its bid. (R. 618.) Syscom understood that Cellcom would rely on Syscom's bid

when it submitted its business plan to Motorola. (R. 545, 546, 760.) Syscom submitted a detailed bid to Cellcom, stating that it would construct the three sites for $205,477. (R. 545; Ex. 5.) Syscom agreed to build the three sites for the bid amount. (R. 618, 620.) Cellcom relied on and submitted Syscom's bid to Motorola as part of Cellcom's business plan. (R. 544, 546, 618.) Cellcom received the funding from Motorola, and believed the financing, based on Syscom's bid, would be sufficient to construct the system and fund operations for one year. (R. 546, 566.)

11. Cellcom and Syscom reduced their contract to a written Management Agreement, which was Trial Exhibit 1 and Trial Exhibit 75, a copy of which is the first document in the Addendum to this Brief. It provided, *inter alia,* that Cellcom was an independent contractor with certain enumerated performance obligations.

12. Syscom's compensation was specified in the Management Agreement. (Trial Exs. 1 & 75; Addendum hereto.)

13. The Management Agreement provided that: "Syscom shall, at its own expense, provide a telephone line with a unique telephone number listed in the local telephone listings as the telephone number of the Cellular Business." (Id., p. 10) (emphasis added).

14. The Management Agreement stated how Cellcom could terminate the Management Agreement. (Id. at ¶ 10.)

15. Cellcom contracted with Syscom to build the sites because Syscom convinced Cellcom that it could construct the sites within budget. Marie Bagshaw of Cellcom testified that:

> [t]hey had actually - they built their own buildings. They showed us buildings that they had built to put up at the cell sites. They had erected towers. They had crews to do that . . . They had a building in their back room or their work area, their

> garage area, that they showed us that they had constructed (Ex. 4) . . . . One they had constructed and was going to be using for another site. One of their radio sites, two way or a microwave. This is a building that is the same type of building that would use for cellular to install your equipment . . . They represented to us that they could build that building. (R. 540-541; Ex. 4.)

16. Ms. Bagshaw testified that Neal Sorensen, Syscom's President,

> had represented to us that - you know - his people were qualified to help build the system and to help construct the buildings and whatever needed to be done, [and that] that was always the understanding that we had that their crew would be used as needed to construct the system." (R. 540.)

17. Mr. Sorensen told Cellcom that he had personally constructed buildings and towers suitable for Cellcom's purposes, in order to convince Cellcom to enter into the Management Agreement. (R.541, 543, 757, 800.) Mr. Sorensen testified that "in 1989 Cellcom reviewed companies locally to help them construct the business. Evidently we satisfied them that we could perform the services that they required." (R. 753.) Mr. Sorensen testified that in the Fall of 1989 "I convinced them that I could do this for them. I sold Syscom services to them." (R.757.) Cellcom relied on Syscom's competence inferred from its representations that it was a contractor that could build the sites. (R. 541, 543, 757.)

18. Syscom subsequently hired subcontractors and materialmen to build the three sites, including Dennis Martinsen, Jackson Insulation and Construction, Earl's Fencing, D&D Electric, Larry Allred, Swain's, Freestone Construction, Web Crane and others. (R. 703, 708-711.)

19. The system had to be minimally operational by October 5, 1990, and it was. (R. 626.)

20. Syscom directly paid the persons and materialmen who worked on the sites. Syscom never asked for authorization to make any construction-related expenditure or to pay anyone. Syscom alone decided how to spend the construction money. (R. 570, 657.)

21. No officer or employee of Syscom had ever been a licensed contractor or licensed electrician, either before or during the construction. (R. 723 -724.)

22. Syscom listed itself as the owner of and general contractor for the Asphalt Ridge cell site on the building permit application for that site. (R. 724 -726; Ex. 56.) On the same application, Syscom listed itself as the electrical contractor for the Asphalt Ridge cell site. Id. Again, on the Blue Bench cell site building permit application, Syscom listed itself as the owner of and general contractor and electrical contractor for the site. (R. 727, Ex. 57.)

23. Syscom was paid the $10,000 a month to, among other things, have Mr. Sorensen manage construction, which funds were withdrawn from the construction account, with respect to which "you could only do a draw down after you had completed a phase of the construction." (R. 547-548.)

24. It was the parties' understanding that the $10,000 monthly fee was for Syscom and its employees to construct, operate and maintain the system. (R. 578-582, 631, 632, Ex. 1.)

25. Mr. Sorensen managed the construction of buildings and towers. He was "out there working with the crews," and was the "responsible [person] from Syscom to see that the cellular system was constructed." (T. 578-582.)

26. Long before construction began, an East Coast engineering firm conducted radio frequency studies to determine the best locations for the cell sites and MTSO. (R. 532, 559.)

There is no evidence that Syscom was supervised by a licensed general contractor, licensed engineer, architect, Cellcom, or anyone, when it built the sites.

27. Before beginning construction, Mr. Sorensen determined ownership of the land where the engineers had determined the site should be located. He also employed a local engineering firm to plan how to get power lines to the sites. (R. 763.)

28. Motorola lent Cellcom enough money to construct the first phase of the system and operate it for a year after completion of the first phase. (Ex. 14, R. 566, 654.) It would take five years to complete the entire system that would cover Duchesne, Uintah, Daggett, Carbon, Emery and Grand counties. (R. 567, 772)

29. A total of $488,258.93 was available to Syscom. Of this, $30,000 was wired to Cellcom's FCC attorney in Washington, D.C., $81,740 was wired to Cellcom officers for salaries and expenses (R. 558), leaving $376,518.93 to construct the first phase of the system and to operate it for one year. (Ex 14, R. 668.)

30. Syscom helped Motorola install switches and cell site equipment (R. 769); Syscom arranged for an outside billing company to manage the subscriber billings. (R. 770.)

31. A condition of Cellcom's financing agreement with Motorola required Cellcom to submit quarterly accountings to Motorola detailing how each dollar borrowed from Motorola had been used. (R. 564.) In turn, a condition of Syscom's contract with Cellcom required Syscom to prepare detailed financial reports about the construction and operation of the system. (R. 537-538, 813, Ex. 1, pp. 3-4.)

32. Syscom had Cellcom's funds at its disposal. Syscom was supposed to set up a construction account and a capital account in Cellcom's name, but never did; instead it established

accounts in Syscom's name only. (R. 537, 564.) Syscom received monthly checking account statements, yet Syscom never forwarded any monthly statements to Cellcom. (R. 564-566.)

33. The first quarterly accounting was due in October 1990, the second in January 1991. (R. 637, 655.)

34. On several occasions, as to the accounting Syscom was supposed to do, Cellcom asked Syscom to submit invoices and bank records so it could account to Motorola as to how the funds had been spent. (R. 568, 570.) Syscom failed and refused to keep Cellcom appraised of how the funds were expended as the system was built. (R. 538-539.)

35. In late November 1990, Syscom informed Cellcom that it was nearly out of money. (R. 569.) This notification was the first that Cellcom knew that funds were getting low. (R. 569, 657.)

36. In late November or early December 1990, Ms. Bagshaw telephoned Mr. Sorensen at least twice and informed him that the receipts he had supplied were incomplete, and that without complete information she could not account to Motorola. (R. 607.) Mr. Sorensen promised to comply. (R. 607.) He sent some information, but never enough to account for the monies spent. (R. 637-638.)

37. Mr. Sorensen knew Syscom had a contractual obligation to provide detailed financial reports to Cellcom. (R. 813.) He admitted that the financial information he submitted to Cellcom was incomplete and inadequate. (R. 814.) Syscom's bookkeeper was never instructed to send any invoices or receipts to Cellcom. (R. 836-837.)

38. In November 1990, and again in February 1991, Cellcom attempted to account to Motorola for the funds and submitted what information it had, but Motorola rejected it.

(R. 568, 655.) Motorola refused to provide any more funding to Cellcom unless and until it properly accounted for the funds. (R.567-568.) Mr. Sorensen knew that Motorola could not understand and was dissatisfied with the financial documents that Syscom had submitted. (R. 812-813.)

39. In mid-January, Mr. Dennis O'Neill, President of Cellcom, instructed Ms. Bagshaw not to telephone Mr. Sorensen. (R.605.) She was not instructed to not return Mr. Sorensen's calls or write to him. (R. 605.) In January 1991, Ms. Bagshaw traveled from her Florida office to visit Syscom in Vernal. She asked to see invoices, bank statements, and other documents so Cellcom could do the accounting that Syscom was supposed to have done. Mr. Sorensen told her he did not have the information, that he had mailed it to her at Cellcom's Florida address. She did not receive anything from Syscom through the mail until mid-February, and only after additional written and oral demands. (R. 616-617.)

40. On February 7, 1991, Ms. Bagshaw sent a certified letter to Neal Sorensen, again asking for a complete accounting and for all underlying documents. (Ex. 18, R. 570.) On February 11, 1991, Syscom acknowledged receipt of the letter and wrote back agreeing to submit the information, admitting that Cellcom "ha[d] every right to this information." (Ex. 19, R. 571.)

41. On March 1, 1991, Ms. Bagshaw telephoned Mr. Sorensen to discuss a variety of topics. She informed him that Cellcom was not happy with Syscom's performance. (R. 606.)

42. On March 8, 1991, Syscom filed three mechanic's liens on the property it had improved. (Ex. 49, 50, 51.) Once the liens were filed, Motorola threatened to declare the financing agreement with Cellcom in default unless Cellcom took the system over from Syscom. (R. 573.)

43. On March 20, 1991, Cellcom, exercising its rights under the Management Agreement, took the system over and relieved Syscom of its duties based on at least three grounds: (1) Syscom failed to follow Cellcom's directives; (2) Syscom spent excessive amounts of money; and (3) Syscom sold a competing product. (R. 568, 572, 578; Ex. 22.)

44. The financial records turned over by Syscom after the March 20, 1991, takeover were incomplete, and Cellcom could not determine what had been purchased by Syscom and where the money had been spent. (R. 579.)

45. Syscom never properly accounted for how it spent the money at any time between July 1990 (when construction began) and March 1991, or at any time thereafter. (R. 638, 817.)

46. The first phase of the system construction was more or less substantially completed sometime in January 1991. (R. 807.) However, additional monies had to be spent on equipment to complete the system after Cellcom ended the contract. This equipment should have been installed by Syscom as part of constructing the system. (R. 662.)

47. During the time Syscom operated the system for Cellcom, it solicited all of Cellcom's customers by including a brochure with Cellcom's billing statement for its subscribers that advertised a non-cellular two-way radio sold by Syscom, in direct violation of the Sales Agent Agreement and the Management Agreement. (R. 574-575; 649; 727-734, 740; Ex. 61.) Syscom agreed that the ad encouraged customers to not use cellular phones. (R. 728.)

48. Mr. Sorensen claimed that goods and services reflected in the invoices were actually received by Cellcom. (R. 799.)

49. Bills from suppliers and others arising from building and operating the system were paid by Syscom with Cellcom's money. The bills were not paid for with Syscom's money. (R. 821.)

50. When Cellcom took over the system on March 20, 1991, the system was operating, but numerous problems were later discovered. The electrical wiring at the Blue Bench, Asphalt Ridge and MTSO sites was done in violation of the National Electric Code. (R. 603.) The billing system did not work, as the master codes had been removed, requiring at least a week's time to reprogram. (Ex. 48, R. 601.) Mr. Sorensen claims that the billing system was working when Syscom turned the system back to Cellcom. (R. 795.) Three expensive antennas purchased by Syscom with Cellcom's money were not given back to Cellcom. (R. 603-604.)

51. Syscom was obligated under the Management Agreement to set up roaming agreements with other cellular and land line telephone companies. No roaming agreements were set up by Syscom. (R. 643; Ex. 1, 75.)

52. The Management Agreement provided that Syscom would build and then operate the system for five years in exchange for $10,000 a month. Syscom was to receive $600,000 for these services over this period. (Ex. 1, 75.)

53. The Management Agreement provided that Syscom would perform all listed services, including constructing the system, for a monthly flat fee. When the contract was negotiated, there were no discussions relating to Syscom charging Cellcom separately for the work of Syscom's employees or technicians. (R. 580-581, 761.) Cellcom never agreed to or understood that the Management Agreement would permit Syscom to charge Cellcom for its own employees' time. The $10,000 a month fee was for Syscom's services, including the services of

its employees. (R. 531-532, 580-581.) Before Cellcom took over the system on March 20, 1991, it was never informed by Syscom that it was charging Cellcom for the time of its employees. (R. 656.) The invoices reflecting "tech hour" (or employee) charges offered no detail of how hundreds of hours of "technicians'" time had been spent. (R. 555-557; Ex. 2, 10, 13.) Mr. Sorensen said he never billed Cellcom for his time as tech hours. (R. 719.) Mr. Sorensen thought the tech hours were allowed under ¶ 4(a) of the Management Agreement. (R. 718.) Syscom improperly charged and received from Cellcom $32,072.50 for hours worked by Syscom employees, and for hours worked by Neal Sorensen himself. The tech hours were not part of Syscom's bid to build the system. (R. 621.) Syscom prepared no billings or reimbursement requests for tech hours until after the contract had been terminated on March 20, 1991. (R. 656, 714; Exs. 25, 33, 34, 35, 37, 42, 43.)

54. The Management Agreement (¶¶ 3, 10 ) expressly provided that Syscom would "at its own expense" provide telephone services and office services to Cellcom. Consequently, its claims against Cellcom for its own telephone and office expenses were not paid by Cellcom.

55. Syscom's request for reimbursement of $1,713.67, as reflected on Exhibit 27, is proper to the extent that it was for travel expense reimbursement. (R. 645, Ex. 27.) It was not paid because Syscom had spent all the money. Likewise, the charge for $1,760.00, as reflected on Exhibit 28, is proper insofar as it was for equipment and parts. However, $326.00 worth of parts, as reflected on Exhibit 28, was never received. The balance was not paid because Syscom had spent all the money. (R. 646; Ex. 28.) Subscriber fees for customers were obtained in amounts of $4,800 and $2,258.01 were payable, but were not paid because Syscom had not

identified the identity of the subscribers, and had spent all the money. (R. 647-648; Ex. 30 and 31.)

56. Cellcom assumed control of the system on the morning of March 20, 1991. On that same day, Neal Sorensen withdrew $4,237.20, the balance then present in the Cellcom bank accounts, without Cellcom's knowledge, permission or authority. (R. 598,740-744; Exs. 65, 66.)

57. Syscom failed to account for the money it expended. There was $376,518.93 available to Syscom at the inception of the project. Relying on Syscom's bid to construct the sites for $205,477, Motorola budgeted $220,000 for construction, plus $10,000 per month for twelve months [October 1990 through September 1991], or $120,000, a total of $340,000 to construct and operate the system. (R. 547, 624, 654, 655, 662, 668; Ex. 14.) In November 1990 Syscom had run out of money, expending over $376,518.93. (R. 569.) When Syscom exhausted the funding, there should have been enough money to pay the $10,000-per-month fee for another ten months, plus $36,500 surplus that the original funding provided. (R. 547, 569, 624, 662.) Syscom provided no accounting of how this $136,500 was expended or why none of it was available. (Ex. 73; R. 638, 814.) Nor did Syscom account for how the construction funds were expended. (R. 669.) Even at trial Syscom still presented no sufficient documentary evidence accounting for how these funds were expended. (R. 538; Ex. 73 and 74.) Ledgers, seen for the first time at trial (Ex. 73, 74), did not include invoices, a beginning balance or an ending balance. (R. 638, 814.) Mr. Sorensen admitted that the ledgers were not sufficient to conduct an accounting. (R. 814.)

58. The dollar amounts listed on the three mechanic's liens were derived from invoices that Syscom claimed reflected monies owed it by Cellcom. (R. 826-827; Ex. 76.) In reviewing

the invoices, Mr. Sorensen could not tell which invoice listed service or materials improved which site. (R. 673-677.)

59. Syscom failed to negotiate landline interconnection agreements, or perform many other contract duties, including negotiating for roaming agreements. (R. 774.) Mr. Sorensen said he completed the interconnection agreements. (R. 777.)

60. Marie Bagshaw was an employee of Cellcom from 1989 until 1993. (R. 1396, Affidavit of Dennis O'Neill ¶ 2, offered with Plaintiff's Rule 59 motions; evidence rejected by Court's Ruling, November 9, 1995, R. 1307.)

61. During that period, she had control and possession of documents associated with the Utah-5 market. She was the only Cellcom employee with knowledge of Syscom's activities. She was the only witness for Cellcom during the October 1992 bench trial. (Id. at ¶ 3.) She was Cellcom's representative in Utah for purposes of this litigation. She was to have assisted Cellcom's attorneys in their preparation of the case. (Id. at ¶ 4.)

62. In 1993, long after the trial was completed, Mr. Dennis O'Neill discovered that Marie Bagshaw had purposefully deceived him with regard to Utah-5 operations. Among other things, she had failed to inform Cellcom's attorneys of facts directly relevant to the litigation with Syscom, including gross accounting irregularities and problems with the cellular system that she discovered after Cellcom had assumed control of the system in March 1991. (Id. at ¶ 5.)

63. Ms. Bagshaw's deception of Mr. O'Neill and Cellcom's attorneys prevented them from discovering relevant evidence about Syscom's improper activities, breach of contract, and other evidence relevant to this litigation. As a result, Cellcom was unable to present a complete case in October of 1992. (Id. at ¶ 6.)

64. O'Neill has had a relationship with Motorola since 1985 and was not introduced to Motorola by Neal Sorensen. (R. 1369, Affidavit of Dennis O'Neill, ¶ 7, offered with Cellcom's Rule 59 motions; rejected by court in its Nov. 9, 1995 Ruling, R. 1307.) In order to file applications for the FCC lottery, Cellcom took many steps to qualify for financing with Motorola. (Id. at ¶ 10.)

65. Upon earning the right to construct the cellular systems in Utah-5 and PA-11, Cellcom entered into financing agreements, among other agreements, with Motorola that provided that the permits, assets and physical improvements in each market cross-collateralized the loans in the other market (in addition to other assets pledged). For example, if Cellcom defaulted on its Utah-5 loan, Motorola had the right to foreclose on the Utah-5 permit, property and assets or on the PA-11 permit, property and assets, or both. (Id. at ¶ 14.)

66. Due to Syscom's failure to account for the monies that it spent, Motorola declared Cellcom in default of the Utah-5 loan, and among other things, foreclosed on both the Utah-5 and PA-11 permits, property and assets. (Id. at ¶ 15.)

67. A few months before the foreclosures, Cellcom received a bona fide offer to purchase the construction permit, property and assets for PA-11 for $9,000,000 cash. Cellcom did not accept the offer. (Id. at 16.) Due to Syscom's breach of contract in failing to account, Cellcom lost the PA-11 market valued at $9,000,000. (Id.)

68. An accounting was completed during pendency of the first appeal, which shows substantial losses suffered by Cellcom due to Syscom's mismanagement, misappropriation of funds, and other contract violations. For instance, the accounting shows:

a. Syscom paid itself $107,638.54 for a few months work, far in excess of the $10,000 per month management fee;

b. Syscom spent $189,093.26 on equipment, although all telecommunication equipment was supplied directly by Motorola;

c. Syscom spent $7,511.53 of Cellcom's money on office expenses when the Management Agreement provided that Syscom would run the office "at its own expense";

d. Syscom spent $11,708.54 of Cellcom's money on telephone expenses when the contract specifically provided that Syscom would provide the telephone line at "its own expense." (Id. at ¶ 18 and Ex. B [accounting].)

69. The above-recited accounting evidence could not have been produced at trial because Cellcom had still not received all receipts, invoices, checks, ledgers and the like from Syscom despite repeated discovery requests. It was not until after the trial that Cellcom hired a certified public accountant to go through Syscom's incomplete records to determine what was still missing, reconstruct missing information from bank accounts, recreate ledgers, and to fully account for the hundreds of thousands of dollars spent by Syscom. (Id. at ¶ 20.)

70. Some of this evidence was not collected by Cellcom's attorneys because they did not have sufficient time before trial. Knowing that they were not prepared, and for other reasons, attorneys Heaton and Schow of Prince, Yeates & Geldzahler, moved to withdraw so other counsel could more completely investigate and try the case. The court denied the motion four days before trial and the case went forward without Cellcom's lawyers being sufficiently prepared. (Id. at ¶ 20.)

71. Mr. Sorensen did not promote the business. He did not perform any marketing functions. He failed to ensure that roaming agreements were reached with other cellular companies. (Id.)

72. There were many problems with the system when Cellcom took it over in March 1991. Cellcom was not aware of the many problems, as its agent Marie Bagshaw either did not know of the problems or did not inform attorneys Heaton, Schow and Eckersley of those problems. Some of those problems were as follows:

a. The Asphalt Ridge cell site tower was installed at the wrong location. Cellcom's FAA and FCC filings specified the exact location of the tower. Syscom moved the tower to a different location and then informed Cellcom. This required expensive re-engineering and additional FAA and FCC filings.

b. The Blue Bench cell site location was also moved, again by Syscom without Cellcom's knowledge, and this time Syscom did not inform Cellcom it had moved the tower. Again, expensive re-engineering and additional government filings were required.

c. At the Asphalt Ridge site no FCC licenses were posted as required by law. No fire extinguishers were included. No first-aid kit was included in the building. The air filter was the wrong kind. The building was built too small. There were holes in the building, allowing numerous insects to infiltrate. There were numerous loose nuts, bolts and screws and expensive telecommunication equipment was not secured or fastened properly to the walls, ceilings or floors.

d. The microwave, a critical piece of equipment that was installed from the Asphalt Ridge cell site to the Vernal MTSO building, was the wrong piece of equipment as it was not redundant. That is, if that microwave went down, the whole system would also be down.

e. Weather stripping was not installed in the Blue Bench building and improperly installed in the Asphalt Ridge and MTSO buildings. The Blue Bench tower was bent, probably caused by a guy wire being incorrectly installed. The grounding of the Blue Bench equipment racks was not completed. The Blue Bench microwave was also not redundant.

f. The Vernal MTSO site had extensive cracking of the asphalt installed around the circumference of the building causing swelling and water infiltration into the building.

g. The doors in all three sites leaked water, dirt and insects allowing the buildings that were suppose to be air tight to be infested with bugs, cobwebs and scorpions.

h. The telephone lines from and to the sites were not completed as required. None of the coax cables were provided with ice shields as required.

i. About 30 or 40 safety locking nuts were missing on the towers, causing the towers to be very dangerous. No lightning protection was provided on the towers.

j. Against Cellcom's express orders, Syscom used Cellcom's money to employ Cellcom's engineering firm to engineer Syscom's own communications site at Little Mountain and caused it to be treated as one of Cellcom's sites as indicated on the Cellular Geographic Service Area (CGSA) maps. The CGSA maps at the time continually show Little Mountain as one of Cellcom's sites when it was not, and when, in fact, it belonged to Syscom. Mr. O'Neill suspects Syscom used Cellcom's money to improve the site by having an expensive power line run up the mountain to their site.

k. System manuals and documentation left behind by Syscom were in a mess. The upgrades were not put in the manuals and old manuals were intermingled with new manuals. (R. 1365 at ¶ 19 and attachments thereto.)

73. Syscom did not develop any sales agents as was required in the Management Agreement. (Id.)

74. In February 1992, before John R. Anderson took the bench, he was a partner in the two-person firm of Beaslin & Anderson. (Affidavit of Andrew M. Morse, ¶¶ 3, 4; R. 1341.)

75. During that month, Neal Sorensen, President of Syscom, proposed to sell his shares back to Syscom. (Affidavit of Rodney Hauer, ¶¶ 2-4; R. 1214.)

76. McKeachnie & Allred, Syscom and Neal Sorensen's lawyers in this action, drafted a detailed Stock Purchase Agreement ("Agreement") whereby Syscom would purchase Neal Sorensen's stock for $72,000 over four years with interest as reflected in the Agreement attached to the Affidavit of Rod Hauer. (Id. at ¶ 5.)

77. Mr. Hauer then became president of Syscom. McKeachnie & Allred had a conflict of interest in representing Neal Sorensen (the seller) and Syscom (the buyer) in the transaction and sent Syscom to Beaslin & Anderson to be represented by that firm. (Id. at ¶¶ 6-7.)

78. Beaslin & Anderson accepted the employment of Syscom and Rod Hauer. Beaslin & Anderson, through Mr. Beaslin, represented Syscom and Rod Hauer in the Agreement which was signed in February 1992, but was to be performed over the next four years. (Id. at ¶¶ 7-8.)

79. Judge John R. Anderson was appointed to the bench in July 1992 and took the bench in September 1992.

80. Counsel for plaintiff discovered Beaslin & Anderson's involvement with Syscom when this lawsuit was tentatively settled in late July 1995. (Aff. of Andrew M. Morse ¶ 3; R. 1341.) At that time, counsel did not know Judge Anderson had been associated with Attorney Beaslin. (Id. at ¶ 4.)

81. The Agreement referred to the instant litigation and made provisions for the division of any judgment awarded to Syscom. (R. 1210.)

82. During the August 21, 1995 hearing on plaintiff's motion to enforce an oral settlement agreement, the Agreement was entered as an exhibit. Judge Anderson read the Agreement, that expressly listed his firm as representing the defendant, but said nothing about an appearance of impropriety or impartiality. (Affidavit of Andrew M. Morse, ¶ 5; R. 1341.)

83. From the court's silence and his duty under U.C.A. § 78-7-1(1) and Canon 3 of the Utah Code of Judicial Conduct, to disclose prior representation of Syscom, plaintiff's counsel concluded that either Beaslin & Anderson had in fact not represented Syscom, or that the court had disclosed its representation of Syscom to prior counsel for Cellcom, Messrs. Schow, Heaton and Eckersley, of Prince, Yeates & Geldzahler, and received their consent to continue on the case. (Id. at ¶ 6.)

84. On August 22, 1995, Mr. Morse contacted Mr. Eckersley, who reported that he knew nothing of Judge Anderson's representation of Syscom and that no disclosure had been made. He promised to check with Mr. Schow, but warned Mr. Schow was no longer with the firm and plaintiff's counsel could not locate him. (Id. at 7.)

85. On August 25, 1995, Mr. Morse spoke with Mr. Beaslin who confirmed that Beaslin & Anderson had represented Syscom as indicated in the Stock Purchase Agreement. (Id. at ¶ 9.)

86. On October 3, 1995, plaintiff's counsel learned from Mr. Eckersley that Judge Anderson had not disclosed to Mr. Schow, or Mr. Heaton that his firm had represented Syscom. Mr. Eckersley apologized for the delay in finding Mr. Schow, as his whereabouts after having left Prince, Yeates & Geldzahler had been unknown. (Id. at ¶ 9.)

87. Plaintiff moved to recuse Judge Anderson on October 11, 1995. (R. 1050.)

## SUMMARY OF ARGUMENT

Syscom's counterclaim fails because it arises from Syscom's work as a contractor while Syscom was unlicensed. The trial court's holding that Syscom could recover because it was Cellcom's agent, and therefore not a contractor, is wrong, because even an agent must be licensed if it does contracting work within the meaning of the Utah Construction Trades Licensing Act, U.C.A.§ 58-55-101 et seq. (1995).

Syscom was not entitled to recover because it failed to prove that it had completely performed the subject contract: it grossly overspent, failed to account for monies spent, and failed to perform other contract duties. The court's refusal to make these findings was clearly erroneous. Rather, the court should have found that Syscom's breaches caused Cellcom substantial damages. Further, the court abused its discretion by failing to reopen the case or order a new trial to consider additional detailed evidence of Syscom's breaches and Cellcom's damages.

Finally, the court erred by failing to recuse itself. A few months before hearing this case, the court's two-person firm represented Syscom on a transaction related to this litigation, raising

the specter that the court may have had a financial interest in the case, and creating the appearance of impartiality sufficient to warrant recusal.

## ARGUMENT

### POINT I

### THERE IS NOT SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT SYSCOM WAS NOT A CONTRACTOR UNDER THE UTAH CONSTRUCTION TRADES LICENSING ACT.

Syscom's counterclaim against Cellcom must fail unless Syscom was not engaged as a contractor under Utah Code Ann. § 58-55-101 et seq. (1995), the Utah Construction Trades Licensing Act ("Act"), or unless Syscom qualified for a statutory or common law exception to the licensing requirement. American Rural Cellular, 890 P.2d at 1036. Cellcom presented evidence at trial that Syscom fell within two statutory definitions of contractor: (1) any person who represents himself to be a contractor by advertising or any other means; and (2) a construction manager who performs management and counseling services on a construction project for a fee. Utah Code Ann. § 58-55-102(b) and (e) (1995). Nonetheless, the trial court determined on remand, without addressing either of these statutory definitions, that Syscom was not a contractor, but was Cellcom's "agent."

The court erroneously concluded that because Syscom was Cellcom's agent, it need not be licensed under the Act. This conclusion is at odds with the Act, the fundamental premise of which is that persons who perform services in the "construction trade" must be licensed:

> Any person engaged in the construction trades licensed under this Chapter, or as a contractor regulated under this Chapter, shall become licensed under this Chapter before engaging in the trades or contracting activity in this state unless specifically exempted from licensure under § 58-55-305.

Utah Code Ann. § 58-55-301 (1995). "Construction trades" are defined as:

> Any trade or occupation involving construction, alteration, remodeling, repairing, wrecking or demolition, addition to or improvements of any building, highway, road, railroad, dam, bridge, structure, excavation or other project, development or improvement to other than personal property.

Utah Code Ann. § 58-55-102(6) (1995). The exceptions to the licensing requirement, contained in U.C.A. § 58-55-305 (1995), make no exception for "agents." Finally, the very bar to recovery at issue here expressly prohibits contractors from being "agents":

> No contractor may act as an agent or commence or maintain any action in any court of the state for collection of compensation for performing any act for which a license is required by this Chapter without alleging and proving that he was a properly licensed contractor . . . .

U.C.A. § 58-55-604 (1995) (emphasis added). Thus, because Syscom was performing a construction trade due to its "construction . . . [of a] building [and] road [to the sites]" under U.C.A. § 58-55-102(6) (1995), it was required to be licensed. U.C.A. § 58-55-301 (1995).

This conclusion is consistent with case law where courts look not to the labels attached to relationships between owners and contractors, but instead to the actual work performed to determine whether a license is required. For example, in Reidy v. Blackwell, 681 P.2d 916 (Ariz. App. 1983), the purported "agent" brought an action against an owner to recover wages and a fixed fee owed under a contract to build a house. The "agent" was not a licensed contractor. The court upheld summary judgment for the owner relying on A.R.S. § 32-1153, an identical statutory bar to U.C.A. § 58-55-604 (1995). The court examined the obligations, responsibilities and work performed by the "agent," and concluded that "there can be no doubt that Reidy was acting under this agreement as a contractor within the meaning A.R.S. § 32-1101,"

and that Reidy was barred from suing because he was not licensed. See also, Columbia Group Inc. v. Home Owner's Association, 727 P.2d 352 (Ariz. App. 1986).

The court's designation of Syscom as an "agent" is, therefore, irrelevant under the Act. If it was a contractor under the Act, it needed to be licensed in order to bring its counterclaim.

Even if relevant, the question of whether Syscom acted as Cellcom's agent or as an independent contractor[1] is only relevant to the construction phase of the project, since Syscom could only file mechanics' liens for monies claimed from the construction phase of the project, and not to recover the intangible service fees it claims Cellcom owed it once the system was built. Thus, any indication that Syscom seemed like an agent once the system was built is irrelevant to Syscom's status as a contractor under the Act.[2]

A. Syscom Would Have To Be Under Cellcom's Daily Control During the Construction Phase of the Project in Order To Be Its Agent.

An agency relationship may result when one is subject to control as to the means employed to accomplish a result or perform a job, while an independent contractor relationship arises when one is not under such control. Thiokol Chemical Corporation v. Peterson, 15 Utah 2d 355, 393 P.2d 391, 359 n.6 (Utah 1964). In Glover v. Boy Scouts of America, 299 Utah Adv. Rep. 10 (Utah 1996), the Utah Supreme Court discussed the amount of control necessary to establish an

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[1]One may be an independent contractor for some purposes and an agent for other purposes. See Gordon v. CRS Consulting Engineers, Inc., 820 P.2d 492 (Utah App. 1991) (status as independent contractor and agent are not always mutually exclusive). Thus, even if this Court determined that Syscom acted as Cellcom's agent for some purposes, this should not detract from the relevant inquiry: whether Syscom was a contractor as defined under Utah statute.

[2]This Court observed that Syscom could also file mechanics' liens if it fell within a statutory exemption to licensing. The trial court based its award to Syscom for improvements covered under the liens solely on its determination that Syscom was not a contractor, not that it fell within one of the statutory or common law exemptions to the Act. (Findings of Fact and Conclusions of Law, ¶1).

agency relationship and concluded that a scoutmaster was not an agent of Boy Scouts of America ("BSA"). The plaintiff contended that BSA exerted sufficient control over scoutmasters to deem them agents, because BSA prohibited scoutmasters from taking major departures from BSA policies or from undertaking certain dangerous activities, required them to wear specific uniforms, required them to seek permission before their troops raised funds, and provided scoutmaster training and suggestions for troop activities. Nonetheless, the court viewed this evidence as insufficient as a matter of law to establish an agency relationship. Glover, 299 Utah Adv. Rep. at 13-14. BSA was not the principal of the scoutmaster because it did not "retain the right to control day-to-day troop operations." Id. at 12. See also Foster v. Steed, 432 P.2d 60, 63 (Utah 1967) (Texaco franchisee was not agent even though Texaco instructed it on marketing and operations because Texaco did not retain day-to-day control, but "merely influenced the result to be achieved.")

There must be substantial competent evidence that Cellcom controlled Syscom's daily activities during the construction phase of the project before Syscom can properly be called Cellcom's agent. Without such evidence, Syscom was an independent contractor required to be licensed.

B. Even Marshaling All Conceivable Evidence That Syscom Was Cellcom's Agent, This Evidence Does Not Sufficiently Show That Syscom Was an Agent During the Construction Phase of the Project.

The trial court based its determination that Syscom was Cellcom's agent on the following factors: Syscom arranged the financing for the project by introducing Cellcom to Motorola, which provided financing for the construction phase (Findings of Fact and Conclusions of Law ["F's and C's"] ¶ 1); Syscom completed the interface with US West Communications (Id.);

Syscom did the electrical and telephonic systems engineering to get the system up and running (Id.); Syscom did whatever was necessary with Cellcom's blessing (Id.); as construction progressed, the parties communicated about the progressions "nearly daily," and Cellcom directed Syscom to withdraw money and send it to Cellcom in Florida (F's and C's, ¶ 7).

The only other "evidence" suggesting that Syscom was an agent appears in the Management Agreement, which states that Syscom was to construct the system "subject to Cellcom's exclusive right of unfettered control over business assets, facilities, operations, and policy decisions." Significantly, no unfettered control is reserved over construction activities. Instead, the Management Agreement provided that Syscom would supervise construction of the system, but keep Cellcom apprised of the status of such activities at all times. Finally, the Management Agreement declared that any contract Syscom recommend be executed for the construction of the system be approved by Cellcom.

The above "evidence" does not constitute substantial competent evidence of an agency relationship. Glover, supra. The evidence that Mr. Sorensen introduced Cellcom to Motorola and arranged financing is not competent. Cellcom had had a relationship with Motorola since 1985 and was not introduced to Motorola by Mr. Sorensen. Cellcom had been negotiating with several vendors, including Motorola, prior to Syscom's involvement with Cellcom. Significantly, no one from Cellcom or Motorola confirmed Mr. Sorensen's assertion. Even if competent evidence existed that Syscom arranged for financing, the trial court failed to explain how this fact made Syscom an agent.

Similarly, the other evidence relied on by the trial court to support its conclusion that Syscom was an agent merely indicates that Syscom was performing certain activities on behalf of

Cellcom with the goal of constructing the system. Syscom could have completed the interface and the "electronic and telephonic systems engineering"[3] in the capacity of an agent, independent contractor, partner, or something else. The facts that it communicated "almost daily" with Cellcom and apprised it of activities does not mean that Cellcom dictated the activities and the method of performing them. The crucial evidence, that Syscom performed the above at the direction and under the control of Cellcom, is missing. In fact, the trial court's statement that Syscom did "whatever was necessary with Plaintiff's blessing," suggests that Syscom was an independent contractor who enjoyed a great degree of freedom in determining what was necessary to construct the system and then doing it, with a rubber stamp approval from Cellcom.

There is also a smattering of evidence in Finding No. 7 that might support the court's finding that Syscom was an agent of Cellcom. The court therein found "the parties' actions indicate their recognition that A.R.C. was in total control, and could direct, and at times did direct, how work was to be performed and how money was spent." Yet the court's cites to pages R. 653 and 654 do not support the finding in any respect. The testimony on those pages simply indicates that a certain amount of money was available to construct and manage the system for a year and that at times Cellcom directed that certain money should be transferred to it in Florida or to its attorneys in Washington D.C. That the Management Agreement indicated that Cellcom retained the unfettered discretion to control its assets and facilities, does not mean that Syscom was an agent for these purposes. "Retaining a right to supervise or inspect, without more, does not establish control. (Citations omitted.) Rather, the evidence must tend to establish control or

[3]There is no cite to the record for this finding. The evidence is that an East Coast engineering firm did radio frequency studies to determine where the sites should be located. In addition, Mr. Sorensen was not, nor was anybody else at Syscom, educated or licensed as an engineer.

the right to control the manner of performance." (Citations omitted.) United Employer's Insurance Co. v. Mentor, 1996 W.L. 509559 (Wash. App. Div. 1 (September 1996)).

Here, although Cellcom had a right to control how its money was spent, it did not exercise control over how construction monies were spent. Rather, it let Syscom decide how the money should be spent to best build the system, which Syscom said it could build, promised to build, was capable of building and did, to some extent, build. The evidence is undisputed that no one from Cellcom controlled any aspect of Syscom's construction operation. No one from Cellcom visited Utah during the construction phase of the operation. Marie Bagshaw visited Utah only after construction was substantially completed in January 1991. The court found that "plaintiff and its engineers supervised Syscom." (F's and C's, ¶ 16.) The court cites no evidence for this Finding, aside from the Management Agreement without reference to page or paragraph number. Engineers from the East Coast plotted where the sites should be located, and then had no more association with the project. There is no evidence that any engineer hired by Cellcom, or anybody from Cellcom, supervised Syscom while Syscom built the system.

In review, although the Management Agreement contains language stating Syscom would operate the system subject to Cellcom's right to control assets, facilities, operations and policy decisions, the Management Agreement itself expressly states that Syscom was an independent contractor. (Ex. 1, pp. 1-2.) This Court noted that the parties expressly disavowed any agency relationship between them. American Rural Cellular, 890 P.2d at 1038. The evidence supporting a conclusion that Syscom was a contractor, on the other hand, is much more substantial.

C. Substantial Competent Evidence Exists That Syscom Was a Contractor.

There is "ample" evidence that Syscom fit the statutory definition of a contractor by "represent[ing] [itself] to be a contractor by advertising or any other means." U.C.A. § 58-55-102(7)(b) (1995), American Rural Cellular, 890 P.2d at 1038. This Court noted that Marie Bagshaw testified that Syscom represented to Cellcom that it itself could construct, or contract for the construction of, the buildings needed for the cellular telephone system. Ms. Bagshaw stated that Syscom showed Cellcom buildings and towers it had previously erected for other jobs, and that Syscom's president stated Syscom was qualified to "help build the system and to help construct the buildings and whatever needed to be done." Syscom's president further admitted that he made these representations for the purpose of convincing Cellcom to use Syscom to perform the construction phase of the project. Syscom listed itself as the general and electrical contractor on Cellcom's building permit applications. Finally, the Management Agreement expressly declares that Syscom is Cellcom's independent contractor and not its agent. American Rural Cellular, 890 P.2d at 1037-1038.[4]

Not only does this Court have substantial evidence to conclude Syscom was a contractor because it represented itself as a contractor under § 58-55-102(7)(b), there is "ample support" that

[4]Although the trial court did not address on remand whether Syscom represented itself to be a contractor through advertising or other means, this Court observed that Syscom's president testified at trial that Syscom was "a telephone and radio company, as well as we did a lot of other forms of technical wireless communications." American Rural Cellular, 890 P.2d at 1039. There is no evidence that Syscom represented that it was a telephone and radio company and not a contractor at the relevant times, i.e. when Cellcom was searching for a builder for the system and while Syscom was building the system. The Management Agreement makes no mention of Syscom being a telephone company.

Syscom was a contractor because it acted as a construction manager performing management and counseling services on a construction project for a fee under § 58-55-102(7)(e).[5]

Furthermore, Syscom's president undertook on-site management of the construction and was the responsible person from Syscom to see that the cellular system was constructed. The contract specifically required Syscom to construct the buildings and towers. (Ex. 1, pp. 3-4.) Syscom provided a detailed bid to get the job, just like any contractor. It alone hired and paid subcontractors to perform various tasks. It had to account for construction monies spent. Significantly, it saw itself as a contractor when it employed the contractor's lever– the mechanic's lien. Finally, the trial court found that the $10,000 per month service fee was a fee for "management services" presumably rendered during construction. (F's and C's, ¶ 6.)

Syscom qualified as a construction contractor under U.C.A. § 58-55-102(7)(b) and (e) (1995). It was required under the Act to be licensed. U.C.A. § 58-55-301 (1995). Because it was never licensed, the trial court erred in determining that it could recover under its action to foreclose the mechanics' liens. U.C.A. § 58-55-604 (1995).[6]

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[5]Marie Bagshaw testified that the $10,000 service fee provided for Syscom's compensation in the Management Agreement came out of the construction account, with respect to which "you could only do a draw down after you had completed a phase of the construction." She testified that "that was always the understanding that we had with the Management Agreement . . . was that the $10,000 per month was a construction fee for Syscom for the use of their people to help construct the system." Ms. Bagshaw also testified that Syscom paid all of its subcontractors and suppliers directly, that none of those invoices ever came through Cellcom's office, and that Mr. Sorensen never asked for authorization to make any construction-related expenditure or to pay anyone. American Rural Cellular, 890 P.2d at 1038-1039.

[6]Despite this Court's directive in Cellcom I, the trial court did not apply the evidence to the Act, and did not therefore address whether any of the statutory or common law exceptions apply, apparently conceding that none do. Cellcom, therefore, will not address this issue.

D. No Other Significant Findings Are Supported by the Evidence.

Two other signficant Findings are not supported by substantial confident evidence. They are that Cellcom breached the contract by failing to communicate with Syscom (F's and C's, ¶ 11); and that the construction completed by Syscom was reasonably priced, completed in a workmanlike manner, and that Cellcom was satisfied with the system. (F's and C's, ¶¶ 14, 16.)

The court found that Cellcom breached the implied duty of good faith and fair dealing by ceasing to communicate with Syscom, and that its failure to communicate "commenced several months prior to the termination of the agreement [March 20, 1991]," citing to R. 571. On that page, Ms. Bagshaw identified the February 1991 letter from her to Mr. Sorensen wherein she requested substantial documents and financial records from Syscom; she also identified Mr. Sorensen's return letter dated February 11. She admits that communications at this point were not as regular as they had been. "Neal and I had phone calls, but not on a regular basis. They were sparse at this point." (R. 571.) That is all the evidence that the court cites. In arguable support of this finding, Mr. Sorensen testified that he had "no communication" with Cellcom beginning at the end of January. He quickly retracted and admitted that Ms. Bagshaw "did talk to me one or two times during that period of time." (R. 819-820.) That is the extent of the evidence in support Finding No. 11.

There is overwhelming evidence to dispute the finding. Ms. Bagshaw denied that she failed to communicate with Mr. Sorensen between late January and March 20. She had several phone calls with him. Specifically on March 1 she called him and talked "at length about the problems with the system." (R. 605-606.) They also discussed how many customers were online, and whether to hire a direct sales person. She explained to him that "We have a problem. We

are unhappy with what is going on." (Id.) In addition, Ms. Bagshaw visited Syscom in Vernal, Utah traveling there from Florida by the end of January 1991. She met with Mr. Sorensen, explained the problems, requested documents and was told by him that the documents had already been sent to her office in Florida. After she returned to Florida, and still no documents had arrived in the mail, she again communicated with Mr. Sorensen by sending him a registered letter on February 7, 1991, again detailing the various problems with the system and requesting specific documents. On February 11, Mr. Sorensen sent a reply letter, again promising to deliver documents. None of those documents were ever delivered. The court's finding, therefore, is clearly erroneous because it is "against the clear weight of the evidence." Cal. Wadsworth Constr. v. City of St. George, 898 P.2d 1372, 1378 (Utah 1995), quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987).

The court's finding that the system was completed at a reasonable price and that Cellcom was well satisfied, is against the clear weight of the evidence. (F's and C's, ¶¶ 14, 16.) Evidence in favor of this finding is Ms. Bagshaw's testimony; she testified that the construction costs listed on Syscom's exhibits were pretty close to the bids; but they did not include the tens of thousands of dollars in man hours and tech hours that Syscom claimed. She also testified that the construction was completed, that it was done in a workmanlike manner and it was done quickly. (R. 626.) She also admits that the invoices prepared by Syscom reflect work that was actually performed and items actually purchased, with the exception of the tech hours discussed above. (R. 663.) This is the extent of the evidence in support of the finding.

This is not substantial competent evidence because there is no evidence that items Syscom purchased or work it performed were reasonably necessary, or that the prices charged were

reasonable. There is also no evidence that the tens of thousands of dollars worth of equipment was actually installed, a relevant inquiry in light of Motorola's supply and installation of much, if not all, of the electronic equipment, leaving little or nothing for Syscom to buy or install.

The system was not completed in a workmanlike manner. Ms. Bagshaw testified that initially she thought the system was completed satisfactorily, but later found out that much of the electrical wiring at all the sites were done very poorly, in violation of the National Electric Code, and that much of the wiring had to be redone. Other problems were later discovered: the cell sites had been built on the wrong spots requiring additional engineering and surveying work and additional filings with the FCC and Federal Aeronotics Administration [FAA]; buildings were not airtight as required; towers were bent; equipment was not bolted to the floor, ceilings and walls as required. In sum, the buildings were not constructed in a workmanlike manner.

The most important erroneous finding was that products and services rendered by Syscom were done at a reasonable price. Had it been done at a reasonable price, this lawsuit would never have risen. As Cellcom has adequately proven, Syscom spent way too much money, far beyond the budget amounts to complete the tasks assigned. The finding is clearly erroneous.

## POINT II

### SYSCOM FAILED TO SATISFY CONTRACTUAL CONDITIONS PRECEDENT, EXCUSING CELLCOM'S OBLIGATION TO PERFORM.

Syscom breached material conditions precedent, excusing Cellcom from its duty to pay or reimburse Syscom. Conversely, because of Syscom's undisputed breaches, it failed to prove that it fully and completely performed the contract, thus it is not entitled to contract payment. Rather, Cellcom is entitled to judgment against Syscom for breach of contract.

The facts, as stated above, detail Syscom's breaches and the damages suffered by Cellcom. Essentially, Syscom had $376,518.93 at its disposal, which was more than enough to build the system and then operate it from October 1990 through September 1991. In November 1990 Syscom had spent all the money, and could not account for it. In November 1990 only $240,018.93 should have spent; there should have been $136,500.00 left in the account. In addition, Syscom claims it is entitled to an additional $86,374.40. Therefore, Syscom admits it spent $462,893.33 ($376,518.93 plus $86,374.40), when it should have only spent far less than $300,000.00. Syscom's claims are factually and legally groundless.

Syscom's full and complete performance of the contract was a condition precedent to Cellcom's duty to pay Syscom. "Failure of a material condition precedent relieves the other party of any obligation to perform." Kinsman v. Kinsman, 748 P.2d 210 (Utah App. 1988). Here Syscom failed to perform several material conditions precedent, thereby excusing Cellcom's obligation to pay any further monies to Syscom.

The contract required Syscom to construct the cell sites, operate the system, follow good business practice, and to accurately account for every dollar spent.[7]

Syscom was responsible for the "[d]evelopment, implementation and maintenance of financial controls and procedures, including relationships with financial institutions, to insure

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[7]Cellcom wishes to engage Syscom . . . as an independent contractor to manage the construction, operation, periodic redesign and maintenance of the cellular telecommunications system and business for the permit area. (Ex. 1, 75, pp. 1-2).

Syscom shall perform all services under this Management Agreement under a fiduciary relationship with Cellcom in accordance with the reasonable standards of honesty, integrity and fair dealing, and in a professional manner that will best serve the financial and business interests of Cellcom in the permit area. Syscom's performance under this Management Agreement shall comply in all material respects with good business practices in the industry. (Id. at p. 3) (emphasis added)

efficient collection and deposit, investment and disbursement of funds in the name and on behalf of Cellcom." (Management Agreement Ex. 1, at p. 4) (emphasis added).

Syscom was also responsible for the "[d]evelopment and maintenance of financial record keeping procedures and maintenance of records of all transactions relating to the construction and operation of the system ." (Id.) (emphasis added). The contract provided:

> Syscom shall provide Cellcom with access, upon reasonable notice and reasonable times, to the books and records maintained by Syscom with respect to the system. Syscom recognizes Cellcom's need to have the right to conduct full and complete audits without limitation, all at Cellcom's expense." (Id. at p. 9)

Syscom was required to fully and completely perform all aspects of the contract before it was entitled to compensation: "As compensation for full and proper compliance with the terms of this Management Agreement, Syscom shall be entitled to [listed compensation]." (Id. p. 12) (emphasis added). Syscom breached each of the above quoted material conditions precedent. It did not fully and completely perform the contract and was not entitled to compensation.

Syscom failed to "develop[] and maintain[] financial record keeping procedures and maintain[] records of all transactions relating to the construction and operation of the system." Cellcom repeatedly asked Syscom for all financial records so that Cellcom could do the accounting that Syscom was supposed to do. Marie Bagshaw wrote letters, made phone calls and even personally visited Syscom's offices in Vernal, all in a futile effort to obtain the financial records. Cellcom needed the financial records in order to account to its lender, Motorola, which required quarterly accountings in October 1990 and in January 1991. Cellcom's attempts in November 1990 and February 1991 to account to Motorola with the sketchy information supplied by Syscom were rejected by Motorola. Moreover, Mr. Sorensen knew that his submissions were

unsatisfactory to Motorola, and that further financing was jeopardized by his failure to account. He also understood that the contract required him to account for the money.

Syscom breached material conditions precedent, and cost Cellcom dearly. Not only did it lose $136,000 that should have still been in the bank when Syscom informed Cellcom that it had run out of money, but Motorola refused additional financing, declaring Cellcom in default for failure to account for the loaned funds. The loans given by Motorola to Cellcom to improve the Utah and Pennsylvania permit areas were cross-collateralized, meaning that the Utah-5 and PA-11 permits, assets and improvements secured the Utah note. When Cellcom defaulted on the Utah-5 note due to Syscom's breach, Motorola foreclosed the PA-11 and Utah-5 projects, causing Cellcom to lose the PA-11 permit valued at approximately $9,000,000.

Syscom was also obliged to act as Cellcom's fiduciary, complying with reasonable standards of honesty, integrity and fair dealing. (Ex. 1 & 75, p. 2). By failing and refusing to account, overspending, and filing mechanic's liens, Syscom intentionally and with bad faith breached material provisions of the contract.

Finally, Syscom's paying itself for "tech hours" was a material breach of another condition precedent. The contract specified Syscom's compensation:

> For the benefits conferred and the compensation to be paid to Syscom hereinafter stated, Syscom shall, at its own expense, unless otherwise specifically stated, and subject always to Cellcom's right of continuing control and approval, diligently perform the following services for Cellcom: (Ex. 1, ¶ 3.)

The plain meaning of this provision is that "unless otherwise specifically stated," Syscom was to perform all listed duties including, construction and financial duties, for the compensation specified, $10,000 a month for 60 months, a total of $600,000, plus other remunerations.

Nowhere in the contract does it "specifically state[]" or even so much as imply that Syscom would be paid separately for the services of Mr. Sorensen or his employees.

Although Mr. Sorensen testified that he did not charge for his time, his own invoices demonstrate that he charged and collected $18,247.29 for his time alone. (See Ex. 10, invoice #14545; Ex. 11, invoice 14548; Ex. 12, invoice 14549, including $1,249.79 in "tax.") These exhibits list only "Neal" under "Tech signature," and make no mention of anyone else working the hours charged. Syscom breached a material condition precedent when it paid itself for Mr. Sorensen's time, while at the same time it collected the $10,000 a month contract payment. In addition, it never informed Cellcom that it was making these additional payments to itself. Only after Cellcom took over the system and Syscom presented invoices for tech hours did it learn of this breach.

Syscom's charges for its employees' time was also a material breach. In addition to the above quoted clauses, the contract provides:

> COMPENSATION
>
> a. As compensation for full and proper compliance with the terms of this Management Agreement, Syscom shall be entitled to the following:
>
> (1) A Service Fee to be paid via monthly payments of $10,000 payable on the 15th day of each month during the term of this Management Agreement. (Ex. 1, ¶ 6, pp. 12-13)

This provision means that Syscom would be paid $10,000 a month for 60 months for "full and proper compliance" with the contract. It did not permit Syscom to be paid $10,000 a month for partial compliance, and then charge by the hour for the same work. Paragraph 4 of the Management Agreement, quoted above, means that "at a minimum" the resources that Syscom

would devote included all the efforts of Mr. Sorensen and Mr. Hauer, plus, by necessary implication, any employee's time required to complete the contractual duties. (Ex. 1, ¶ 4, p. 9). As if that were not enough, the first quoted clause provides that for the $10,000 a month. "Syscom shall, at its own expense, unless otherwise specifically stated, and subject always to Cellcom's right of continuing control and approval, diligently perform the following services for Cellcom[.]" (Ex. 1, ¶ 3). Simply put, Syscom was to perform the contract "at its own expense" in exchange for $10,000 a month. Syscom did not perform the work at its own expense; rather, it charged Cellcom for thousands of dollars' worth of its employees' time, in direct breach of the contract.

In addition to the $18,247.29 that Mr. Sorensen collected for his own time, he also collected $15,979.50 for his employees' time. (Ex. 43, invoice 15444; including $904.50 in "tax"). In all, Syscom took from Cellcom's accounts $34,226.79 under the guise of "tech hours" in direct breach of the contract. This is a material, if not egregious, breach of the condition precedent to pay itself only $10,000 a month to perform the contract.

Each of the discussed breaches of a material condition precedent excused Cellcom's obligation to pay Syscom the amounts it claims are owing. Kinsman v. Kinsman, 748 P.2d 210 (Utah App. 1988). In Kinsman, the parties to a divorce settled on terms whereby defendant would assume and pay certain debts for plaintiff's benefit; in return plaintiff waived alimony "now and forever." Defendant did not pay the bills, but filed for bankruptcy. Plaintiff moved to modify the divorce decree, seeking alimony. The trial court granted the motion. The appeals court affirmed, noting failure of a material condition precedent relieves the other party of any obligation to perform.

This same rule naturally applies to construction contracts. In Laurel Race Course, Inc. v. Regal Construction Co. Inc., 333 A.2d 142 (Md. 1975), a contractor sued a race track owner for amounts allegedly due under a building contract. The contract required an engineer to certify that the work was complete and satisfactory. No certificate was obtained. Holding that the certificate requirement was a condition precedent, the court wrote:

> It is fundamental that where a contractual duty is subject to a condition precedent, whether express or implied, there is no duty of performance and there can be no breach by nonperformance until the condition precedent is either performed or excused. [Citations omitted]

Id. at 327. See also, Campbell Bldg. Co. v. State Road Commission, 79 P.2d 857 (Utah 1937) (duty to pay final payment excused by builder's failure to show all debts for construction had been paid); Winn v. Aleda Construction Co. Inc., 315 S.E.2d 193 (Va.1984) (builder's failure to strictly perform excused owner's duty to pay).

As in the cited cases, Syscom's failure to account and its breach of other duties excuse Cellcom's duty to pay the amounts claimed. Stated another way, Syscom's breaches demonstrate that it has failed to satisfy its burden to show it fully and completely performed the contract, and that it was therefore entitled to compensation under the contract. All breaches were material. A fundamental duty of Syscom was to accurately and regularly account for the monies entrusted to it. This was necessary to insure that the system was constructed within budget, that the system was operated efficiently, and most importantly, to satisfy Motorola that its lent funds were carefully managed within budget.

The importance of each condition precedent is demonstrated by the ramifications of its breach. Due to Syscom's failure and refusal to account Cellcom could not account to Motorola,

causing Motorola to declare Cellcom in default. In turn, Motorola foreclosed on the Utah-5 and PA-11 systems, causing millions of dollars of loss to Cellcom. Syscom also breached its duty to carefully manage the funds, spending $136,500 more than it should have by November 1990, when it ran out of money. Even if Syscom had accounted for this money, it could not have justified overspending by $136,500, and Motorola would have likely defaulted Cellcom, anyway. Likewise Syscom's taking $34,226.79 for "tech hours" was a material breach, as Cellcom could not have justified this expense to Motorola, again contributing to default.

There is overwhelming evidence that Syscom breached several material conditions precedent. Syscom's brazen mechanic's liens on Cellcom's property and groundless counterclaim for additional funds add fuel to the fire. Syscom squandered, lost control of, and otherwise fumbled away $376,581.93 of Cellcom's funds that were supposed to last a year but only lasted a few months. Having caused Cellcom to default on its obligations to Motorola and lose the PA-11 permit greatly damaged Cellcom's Utah-5 business, Syscom now wants another $116,000 for its misdeeds. "Such a result will not be tolerated." Kinsman, supra.

## POINT III

## SYSCOM IS ENTITLED TO RECOVER NOTHING.

Syscom should take nothing. As explained, Syscom breached several material conditions precedent, which excuses Cellcom from its duty to pay and reimburse Syscom. Alternatively, Syscom failed to prove that it fully, completely, diligently, and honestly fulfilled all its contractual duties, which it was required to demonstrate to prove that it was entitled to compensation.

Even if Syscom was entitled to compensation and reimbursement, its claim is, for the most part, barred because it was an unlicensed contractor. It claims that it is owed a total of

$86,374.40 (Ex.77). Of this, $77,415.33 is claimed for construction work, improvements and materials installed into the system. (Ex. 76 [summary], Ex. 49, 50, 51 [liens]). As an unlicensed contractor its lien claims are barred, leaving only $8,958.66 of unbarred claims. Of this, $8,872.13 is for claimed "subscriber commissions." (Ex. 30, invoice 15433, Ex. 31, invoice 14437). Syscom provided absolutely no proof that it had actually earned any commissions. No customer names were provided, no dates of sale were provided. We have only Syscom's unsupported invoices created after the system was taken over in March 1991.

Not only is Syscom not entitled to recover any additional funds, its breach of contract damaged Cellcom as follows: Unjustified billings made without Cellcom's knowledge or consent and not provided for in the contract include a $500.00 charge for office, $32,072.50 charge for tech hours, $2,054.29 charge for tax, $2,430.06 for legal, $7,043.60 for on account and $14,813.92 for charges for which there is no proof that it was for anything provided in the contract, for a total of $58,987.37. This amount is only for money that Syscom paid itself that was not provided for in the contract. In addition, Syscom owes Cellcom $136,000 for unaccounted-for funds. This is the amount that Syscom should have had in the bank on the day it ran out of money in November 1990.

The mechanic's liens were improper because Syscom did not have a contractor's license. It was obviously not entitled to collect for any charges as a contractor and therefore it could not have had a legitimate, lawful mechanic's lien. It, therefore, owes Cellcom the attorneys' fees it has expended to contest the liens, and substantial damages.

## POINT IV

## THE TRIAL COURT ERRED IN AWARDING SYSCOM ATTORNEY FEES AND COSTS INCURRED ON APPEAL.

The trial court awarded Syscom attorney fees and costs incurred on appeal in the amount of $22,744.76, attempting to justify its award with the barren statement that Syscom was the "most prevailing party" on appeal. (F's and C's, ¶ 26). The court's award is flawed in two respects.

First, Syscom was not the "prevailing party" on appeal. This Court reversed the trial court's judgment in Syscom's favor in Cellcom I and remanded the case to the trial court "on the issue of whether Syscom can recover" from Cellcom. American Rural Cellular, 890 P.2d at 1042. The trial court erred in determining that this Court's reversal of its judgment in Syscom's favor somehow meant that Syscom was victorious on appeal. It is impossible to tell exactly why the trial court felt that Syscom had "prevailed" on appeal because there are no subsidiary facts supporting the trial court's determination that Syscom was the "most prevailing party."

Second, there is no indication in the record that the amount of attorney fees and costs entered was reasonable. While Syscom's counsel submitted an affidavit stating only that he had incurred $22,744.76 in attorney fees and costs, the affidvait utterly failed to comply with Utah Code of Judicial Administration, Rule 4-505, which requires "legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, . . . and affirm the reasonableness of the fees for comparable legal services." The trial court's perfunctory rubber-stamping of the exact amount requested by Syscom, without requiring

compliance with Rule 4-505, constituted error. The award of attorney fees and costs incurred on appeal and thereafter should be reversed.

## POINT V

### THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CELLCOM'S RULE 59 REQUEST THAT IT RECEIVE NEWLY DISCOVERED EVIDENCE OR ORDER A NEW TRIAL.

After this Court vacated the trial court's judgment and remanded for new findings, Cellcom moved for a new trial or to reopen to consider this newly discovered evidence pursuant to Rule 59, but the trial court denied the request. The court abused its discretion in denying the Rule 59 motion because the evidence was newly discovered, material evidence that should have changed the outcome of the case, had it been received.

Only after the trial ended and Cellcom initiated appeal could Cellcom fully account for the hundreds of thousands of dollars that Syscom expended. Prior to this it could not fully account because Syscom failed and refused to turn over all bank statements and other records requested during discovery. After the trial (which Cellcom moved to postpone in order to do an accounting) Cellcom obtained bank statements, vendor accounts and other financial information necessary to do an accounting. The accounting showed that Syscom paid itself $107,638.54 for a few months' work, even though the Management Agreement limited its monthly draw to $10,000.00 per month as a management fee. It further showed that System spent $189,093.26 of Cellcom's money on "equipment," although Motorola actually directly supplied the telecommunication equipment. Finally, it revealed that Syscom spent over $7,000.00 of Cellcom's money on office expenses and nearly $12,000 of Cellcom's money on telephone expenses, even though Syscom agreed in the Management Agreement to run the office and use the telephone line "at its own expense."

Cellcom learned in late 1993, after appeal commenced, that employee Marie Bagshaw had purposefully withheld information from Cellcom officers about problems with the system until after trial. These problems included Syscom's installation of a tower at the Asphalt Ridge and Blue Bench sites in the wrong location, incomplete grounding of equipment racks at the Blue Bench site, and asphalt swelling around the building Syscom installed at the MTSO site. Nuts, bolts, and screws were loose at every site, and the doors to the buildings at all three sites were improperly installed.

The above evidence was essential to Cellcom's claim that Syscom did not perform, but instead breached the contract. Had the trial court considered on remand the abundant evidence of Syscom's deception and ineptitude, it would have had more than sufficient evidence from which to conclude that Syscom materially breached the contract and was liable to Cellcom for the resulting damages. Cellcom met all the requisites for the reopening of a trial based on newly discovered evidence. Doty v. Town of Cedar Hills, 656 P.2d 993 (Utah 1982) (newly discovered evidence must be material and of sufficient substance to create a reasonable likelihood that the consideration of the evidence would have yielded a different result). Nonetheless, the trial court summarily dismissed Cellcom's Rule 59 motion, despite Cellcom's representation that reopening the trial to consider this new evidence would require minimal time to present. See Gardner v. Christensen, 622 P.2d 782, 784 (Utah 1980) (motion to reopen trial should have been granted where presentation of proposed evidence would not have expended much time). The trial court's refusal to hear all relevant evidence deprived Cellcom of a fair trial and constituted an abuse of discretion.

## POINT VI

## JUDGE ANDERSON SHOULD HAVE RECUSED HIMSELF.

A few months before Judge Anderson took the bench, his law firm represented Syscom and its current president, Rodney Hauer, in a transaction closely related to this case.[8] Cellcom moved to recuse Judge Anderson on two grounds: (a) Utah Code Ann. § 78-7-1(1); and (b) Canon 3(E) of the Utah Code of Judicial Conduct. Judge Anderson refused to recuse himself.

Judge Anderson's failure to recuse himself contravenes Utah Code Ann. § 78-7-1(1)(a), which provides that a judge may not sit in a case "in which he is interested. . ."

Anderson's firm evaluated the merits of this very litigation, and because Judge Anderson's potential exposure, however remote, depends on the outcome of the litigation, he is an "interested" party within the meaning of § 78-7-1(1)(a), and recusal was required.

On the same facts, Judge Anderson should have recused himself under Utah Code Ann. § 78-7-1(1)(c), which provides that "except by consent of all parties, no justice, judge, or justice court judge may sit or act in any action or proceeding . . . when he has been attorney or counsel

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[8]The law imputes to Judge Anderson all knowledge of his then law firm. Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985.) Judge Anderson's law firm represented defendant Syscom and its president, Mr. Rodney Hauer, in the purchase back of 40% of Syscom's stock from defendant Neal Sorensen. In advising Syscom on the fairness of the transaction, Judge Anderson's firm would presumably have assessed the proposed purchase price in light of Syscom's known liabilities and assets. Spector v. Mermelstein, 485 F.2d 474 (2d Cir. 1973); Hart v. Carro Spandock Kaster and Cuiffo, 211 A.D.2d, 620 N.Y.S.2d 847 (1995); Fisher et al. v. Reich et al., 1995 W.L. 23966 (D.N.Y. 1995). In a company then valued by the buyer and seller at approximately $180,000 (Syscom ultimately agreed to pay $72,000 for Mr. Sorensen's 40% ownership stake), the outstanding litigation with Cellcom, where at least $77,415.33 in mechanic's liens, plus statutory attorney's fees, were at stake, was a significant potential asset (or liability) that Judge Anderson's firm would have evaluated. The claims by and against Cellcom were, in fact, so significant to the value of Syscom that they were addressed in the Stock Purchase Agreement ("Agreement") that memorialized the transaction. (Agreement, at ¶ 8; R. 1212.)

After Anderson's firm's presumptive review of the pending litigation and determination of the likelihood of success, Syscom, through Mr. Hauer, signed the Agreement with Mr. Sorensen. Judge Anderson, as a partner at the time these services were rendered, is and remains jointly and severally liable for any potential claims ensuing from the firm's services, including evaluation of the likely outcome of this litigation.

for either party in the action or proceeding." Judge Anderson is charged with representation of all clients of his firm. See Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985).

Code of Judicial Conduct, Canon 3(E) requires recusal when "the judge's impartiality might reasonably be questioned." Code of Judicial Conduct, Canon 3(E)(1).[9] The court's potential financial stake in the case and his firm's representation of defendant Syscom and its President, Rod Hauer, a material witness in the bench trial, constituted grounds whereby the court's impartiality might reasonably be questioned.

Scott v. United States holds:

> The appearance of partiality prescribed by Canon 3(E) can never be waived by the litigants regardless of the immateriality of the Canon violation. Thus, the Canon recognized that some appearances of impropriety are so compelling that given the purposes of the Canons, they can never be waived or deemed harmless.

Scott v. United States, 559 A.2d 745, 751 (D.C. App. 1988). The federal statute that parallels Canon 3(E) is not waivable except if, after full disclosure, the parties waive any appearance of impropriety or conflict. Potashnick v. Port City Construction Company, 609 F.2d 1101, 1114 (5th Cir. 1980). No disclosure or waiver occurred here.

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[9]As Canon 3(E) is incorporated into the Federal Judicial Disqualification Statute, 28 U.S.C. § 455, federal decisions interpreting the statute are instructive. The test for recusal under Canon 3(E) is objective. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988). A judge must recuse from any case in which there is "an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question [the] judge's impartiality." United States v. Heldt, 668 F.2d 1238, 1271 (U.S. App. D.C. 1981), cert. denied, 456 U.S. 926 (1982) (footnote and citations omitted). The standard "is rigorous: [C]ould a significant minority of the lay community . . . reasonably question the court's impartiality?" Reilly v. Southeastern Pennsylvania Transportation Authority, 330 Pa. Super. 420, 458, 479 A.2d 973, 992 (1984). "The objective standard is required in the interest of ensuring justice in the individual case, and maintaining public confidence in the integrity of the judicial process which 'depends on a belief and the impersonality of judicial decision making.'" Scott v. United States, 559 A.2d 745, 749 (D.C. App. 1988) (citations and footnote omitted). Neither bias in fact or actual impropriety is required to violate the Canon. Hall v. Small Business Admin., 695 F.2d 175, 178-179 (5th Cir. 1983).

Recusal was mandated since, as Judge Anderson apparently recognized, a fully-informed person might reasonably question whether the judge "could decide the case with aloofness and disinterest." Pepsico, Inc. v. McMillan, 764 F.2d 458 (7th Cir. 1985). After all, just a few months after his leaving private practice where his sole partner represented the opposing party, he made a series of discretionary rulings and decisions all of which were against Cellcom. The court initially denied Cellcom's motion to continue the trial dates so that it could reasonably prepare. Significantly, he was the trier of fact, judging the veracity of two witnesses representing Syscom, his firm's client: Neal Sorensen, the former president, and Rodney Hauer, current president. He entered judgment for every cent Syscom prayed for. He dismissed the Syscom's breach of a contract as *de minimis*. He denied every post-trial motion in its entirety. See Liljeberg, 486 U.S. at 868 n.10. Judge Anderson did all this without disclosing his firm's prior and ongoing involvement with Syscom. (The stock buyout was amortized through 1996; R. 1206, 1212.) These circumstances present "a situation in which the judge's impartiality might well be questioned." Potashnick, 609 F.2d at 1110.

The issue here is whether the firm's prior representation of Syscom, and its president, who was a trial witness, might cause a reasonable person to suspect that the court might not be impartial. This Court should require the trial judge to recuse himself. This Court should remedy the harm arising from the trial court's failure to recuse by vacating the judgment. Liljeberg, supra. This remedy is particularly appropriate because the trial court sat as the trier of fact. Potashnick, 609 F.2d at 1115. Recusal should be ordered and the judgment vacated.

## CONCLUSION

The court should reverse and remand with directions to dismiss Syscom's counterclaim, enter judgment in favor of Cellcom, and conduct a trial on Cellcom's damages. In addition, the court should order that Judge Anderson recuse himself, and vacate the judgment.

DATED this 15 day of October, 1996.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Andrew M. Morse
Julianne P. Blanch
Attorneys for Plaintiff-Appellant

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## MAILING CERTIFICATE

Andrew M. Morse, attorney for Plaintiff/Appellant, certifies that he served the attached BRIEF OF PLAINTIFF-APPELLANT AMERICAN RURAL CELLULAR, INC., upon counsel by placing two true and correct copies thereof in an envelope addressed to:

Gayle F. McKeachnie, Esq.
Clark B. Allred, Esq.
MCKEACHNIE & ALLRED
Attorneys for Defendants-Appellees
363 East Main Street
Vernal, Utah 84078

and deposited the same, sealed, with first-class postage prepaid thereon, in the United States Mail at Salt Lake City, Utah, on the 15 day of October, 1996.

A. McMorse

Andrew M. Morse

# ADDENDUM NO. 1

# MANAGEMENT AGREEMENT (EXHIBIT 75)

Ex. #2 #75

#32.

# MANAGEMENT AGREEMENT

This Agreement made and entered this _____ day of _____, 1990, by and between AMERICAN RURAL CELLULAR, INC., referred to herein as "CELLCOM", whose business address is 261 Hannover Circle, Panama City, Florida 32404 and SYSTEMS COMMUNICATION CORPORATION, referred to herein as "SYSCOM", whose business address is 1275 East, 335 South, Vernal, Utah 84078.

## RECITALS

A. WHEREAS, CELLCOM holds the permit issued by the Federal Communications Commission (the "FCC") to construct the nonwireline cellular radio telecommunications system (the "System") that will serve the Utah-5 Rural Service Area ("RSA"), which is RSA No. 677 (hereinafter "PERMIT AREA") consisting of Grand, Emery, Carbon, Duschene, Unitah, and Daggett Counties, Utah; and

B. WHEREAS, SYSCOM has been in the communications business in the PERMIT AREA for more than nine (9) years, having engaged in the installation and servicing of two-way and microwave equipment, the operation of a private paging system, and the leasing of communications sites to private radio licensees, and thereby has acquired considerable business experience, name familiarity and business knowledge in the telecommunications industry in the PERMIT AREA; and

C. WHEREAS, SYSCOM holds an FCC private radio license and is accredited by the National Association of Business and Radio Users; and

D. WHEREAS, CELLCOM wishes to engage SYSCOM, consistent with the rules and regulations of the FCC, as an independent contractor to manage the construction, operation, periodic redesign and maintenance of a

E. WHEREAS, CELLCOM and SYSCOM desire to enter into this contract for the purpose of advancing their mutual financial interests by utilizing together the PERMIT, knowledge, experience and assets of CELLCOM and the knowledge, experience, business and community contacts, and assets of SYSCOM in order to engage in the business of providing cellular radio telecommunications services in the PERMIT AREA; and

F. WHEREAS, SYSCOM and CELLCOM desire that SYSCOM sell cellular telephones, accessories and peripheral equipment in the PERMIT AREA which activity is expected to benefit CELLCOM and SYSCOM; and

NOW THEREFORE, in consideration of the above recitals and the mutual agreements herein contained, CELLCOM and SYSCOM hereby agree as follows:

1. TERM

The term of the Management Agreement shall be five (5) years commencing on the _____ day of _____, 1990 and terminating on the _____ day of _____, 1995, subject to review on an annual basis.

2. GENERAL DUTIES OF SYSCOM

a. SYSCOM shall perform all services under this Management Agreement under a fiduciary relationship with CELLCOM in accordance with the reasonable standards of honesty, integrity and fair dealing, and in a professional manner that will best serve the financial and business interests of CELLCOM in the PERMIT AREA. SYSCOM's performance under this Management Agreement shall comply in all material respects with good business practices in the industry, and shall be in compliance with all applicable federal, state, and local laws, rules and regulations.

b. Subject to CELLCOM's exclusive right of unfettered control over business assets, facilities, operations, and policy decisions, SYSCOM shall, as an independent contractor, manage and implement all business

activities for the operation of the said business, including but not necessarily limited to the following:

(i) Operation of physical assets such as antennae, towers, cell sites, switches, transmission lines, spare parts, terminals and tests instruments;

(ii) If an outside billing company is not used, collection of payment and receivables from subscribers will become SYSCOM's responsibility. SYSCOM will be reimbursed $10.00 per month, per subscriber;

(iii) Construction, maintenance and repair of the cellular system;

(iv) Performance of cellular system expansion activities;

(v) Resale of service from the wireline cellular telecommunications system, if applicable;

(vi) Negotiation and implementation of cost-effective interconnection arrangements with local wireline telephone systems, long distance carriers and other carriers;

(vii) Provision of such assistance as CELLCOM may require in preparing reports to the FCC or state and local regulatory authorities;

(viii) Conduction of price negotiations with suppliers, generation of purchase orders, approval of payments to suppliers and verification of receipt of materials;

(ix) Formulation and implementation of standard operating procedures, including programs and policies to assure adherence to safety, environmental and other requirements under applicable federal, state and local laws and regulations;

(x) Coordination of engineering approval of selected vendor products;

(xi) Negotiation and acquisition of appropriate insurance policies;

(xii) Coordination and negotiation with neighboring cellular markets;

(xiii) Selection and acquisition of office facilities and of subscriber, system and office equipment and services;

(xiv) Selection, training and supervision of technical, sales and administrative personnel;

(xv) Development, implementation and maintenance of

(xvi) Development, implementation and maintenance of financial controls and procedures, including relationships with financial institutions, to insure efficient collection and deposit, investment and disbursement of funds in the name and on behalf of CELLCOM;

(xvii) Development and maintenance of financial record keeping procedures and maintenance of records of all transactions relating to the construction and operation of the System; and

(xviii) Performance of all other functions consistent with the purposes of this Management Agreement.

c. Insofar as the obligations or responsibilities of SYSCOM hereinunder require or permit SYSCOM to enter into transactions on behalf of CELLCOM with SYSCOM, the terms and conditions of such transactions shall be on terms and conditions which are no more burdensome to CELLCOM than CELLCOM could obtain in comparable transactions entered into with parties other than SYSCOM.

3. SPECIFIC DUTIES OF SYSCOM

For the benefits conferred and the compensation to be paid to SYSCOM hereinafter stated, SYSCOM shall, at its own expense, unless otherwise specifically stated, and subject always to CELLCOM's right of continuing control and approval, diligently perform the following services for CELLCOM:

a. Facilities Location and Acquisition SYSCOM shall be responsible for the location and acquisition of space on towers and other associated facilities (including microwave facilities) reasonably required to accommodate equipment for the operation of cellular telecommunications services hereby defined to include, but not limited to, local exchange and interchange voice and/or data services, voice mail services, monitoring services, as well as other related services which may lawfully be provided under CELLCOM's PERMIT as it presently exists or as it and any associate

behalf of CELLCOM for additional tower sites and associated facilities, including all terms and conditions of lease agreements or other agreements, subject always to CELLCOM's final approval of any and all agreements. At CELLCOM's cost SYSCOM shall recommend and arrange for purchase and installation of all reserve, all battery, and such generator equipment as is necessary and reasonable for all equipment facilities.

b. Implementation of Business and Financial Plans SYSCOM shall implement a comprehensive three-year business and financial plan, provided by CELLCOM, set forth in Attachment A, and shall assist CELLCOM in the generation of required information and in all other steps for obtaining system financing.

c. Sale and Installation of Customer Equipment SYSCOM shall forthwith establish and commence to operate a professional, ongoing, competitive business for the sale, rental and installation of cellular telephones, accessories and peripherals during the term of this Management Agreement. See Attachment E, Sales Agent Agreement with attached Commission Plan for reimbursement of sign-up commission.

d. Management and Performance of Maintenance Services SYSCOM shall assist CELLCOM in connection with the negotiation and implementation of a Maintenance Contract to be executed by CELLCOM and SYSCOM for both outine and emergency maintenance and repair service required for the operations of the proposed cellular telecommunications system. Service provided by SYSCOM shall include, but not be limited to, the monitoring of the maintenance performed on CELLCOM's system, analysis and review of costs, fees and charges, supervision of the actual maintenance work on the system, performance of routine daily checks and inspections, and comprehensive regular periodic testing and alignment of the System

first class cellular system operation and service. At three month intervals, SYSCOM shall submit to CELLCOM a statement, patterned after Attachment B, attesting to the adequacy of such maintenance.

e. Transition Services Within a reasonable time, or as required by CELLCOM, SYSCOM shall provide assistance, counsel, advice, and cooperation concerning any transfer or relocation of equipment and/or operations that may be necessitated by termination of this Management Agreement. SYSCOM will provide its services to CELLCOM at their then published rates.

f. Bi-weekly Staff Meetings SYSCOM and CELLCOM shall participate in bi-weekly, or as frequent as otherwise necessary, staff meetings (which may be conducted by telephone conference call) at CELLCOM's offices or as otherwise designated, the meetings, which are expected to have a duration of one-half business day or less, shall be conducted in accordance with the following general procedures:

(i) In order to efficiently utilize time, both CELLCOM and SYSCOM shall, to the extent practical, limit to two the number of their representatives attending these meetings;

(ii) SYSCOM shall prepare an agenda prior to each meeting that includes a listing of (a) all significant activities surfacing during the preceding two weeks; (b) all unresolved matters addressed during previous bi-weekly meetings; (c) all issues that may reasonably be expected to be of interest to CELLCOM; and (d) any other items deemed to be of sufficient interest to warrant attention at bi-weekly staff meetings.

(iii) At each meeting an Action Item Listing shall be updated by SYSCOM, in order to provide current information regarding tasks assigned, progress made against previously assigned due dates, personnel responsible for various tasks, and tasks warranting further effort or direction. This Action Items List shall be formatted after Attachment C.

g. Customer Listings and Records CELLCOM, with assistance from

complete list of all customers of the cellular system in a form patterned after Attachment D. Both parties agree the customer lists shall be the sole property of CELLCOM and upon the termination of this Management Agreement, it shall have the sole and exclusive right to possession and control of said customer lists, as well as all other listings and records of the system's customers, including any copies in whatever form and whereever the same may be located.

h. Insurance SYSCOM shall require and maintain comprehensive casualty and liability insurance for all activities and equipment which are the subject of this Management Agreement. CELLCOM shall be named as an insured and SYSCOM as an additional insured. CELLCOM shall pay all necessary costs for such coverage. Insurance policies shall be consistent with those set forth on Attachment E, or in a form acceptable to CELLCOM. SYSCOM shall assure that CELLCOM is provided with copies of all current policies within ten (10) days of their effectiveness. Liability limits shall not be less than $3,000,000 value. CELLCOM's name shall be placed on the policy as a loss payee as its interest may appear.

i. State and Local Approvals SYSCOM shall timely and in writing advise CELLCOM of all necessary state and local authority required for the construction, continuing operation, or additional construction of the System, and take all necessary actions to obtain such authority.

j. Interconnection & Tariffs SYSCOM shall take all reasonable and necessary actions required to obtain and maintain system interconnection and tariffs with the landline exchange carriers in the most prompt manner possible. As appropriate, SYSCOM shall advise CELLCOM of desired charges or advances in existing arrangements.

k. Construction Supervision SYSCOM shall supervise construction of the cellular radio and microwave systems, and at all times keep CELLCOM apprised of the status of such activities.

l. Access to Pertinent Business Records SYSCOM shall provide CELLCOM with access, upon reasonable notice and at reasonable times, to the books and records maintained by SYSCOM with respect to the System. SYSCOM recognizes CELLCOM's need to have the right to conduct full and complete audits without limitations, all at CELLCOM's expense. Any information acquired during the course of such audits shall be protected as confidential information under Section 8 of this Management Agreement.

4. RESOURCES TO BE DEVOTED TO THE SYSTEM

In order to fulfill the obligations set forth in paragraphs 2 and 3 above, SYSCOM shall devote, at a minimum, the following resources to the system:

a. SYSCOM shall devote the time, as necessary, of its Partners, Neal Sorensen or Rod Hauer, to the design and construction of the System until the License is issued and their time as necessary to the management of maintenance, operation and additional construction of the system, which time shall be reasonably split among the duties set forth in this Management Agreement and as otherwise necessary to accomplish the objectives of this Management Agreement.

b. SYSCOM shall, at its own expense, provide a telephone line with a unique telephone number listed in the local telephone listings as the telephone number of the Cellular Business. (CELLCOM will designate the name of the cellular business which shall appear in the local telephone listing.) Such telephone line shall ring into SYSCOM's current system at its current business location. SYSCOM's employees shall answer the

by CELLCOM. SYSCOM shall, at its own expense, add additional cellular business telephone lines if SYSCOM's current telephone system is not sufficient to handle the volume of CELLCOM's telephone calls.

c. SYSCOM shall utilize its current business customer service personnel or hire more quality personnel to answer CELLCOM's telephone calls, and to service potential subscribers and subscribers' inquiries and complaints. SYSCOM shall provide a twenty-four access phone number for customers and Roamer Activations.

5. RESPONSIBILITIES OF CELLCOM

SYSCOM's responsibility for overall system management shall be only limited by the enumerated responsibilities of CELLCOM in this Section 5. CELLCOM shall undertake and diligently perform the following in connection with this Management Agreement.

a. Site Selection and Acquisition CELLCOM shall assist SYSCOM in the location and acquisition, including negotiation and contracting, of space on towers to locate equipment for the rendering of cellular telecommunications services in the Permit Area, including but not limited to, preparing and executing all contracts and leases and other related documents, and purchasing and installing all equipment required by CELLCOM.

b. Contract Execution CELLCOM shall execute such contracts as are recommended by SYSCOM and which are thereafter approved by CELLCOM for the construction, maintenance and lawful operation of the cellular telecommunications system in the Permit Area.

c. Payments CELLCOM shall make lease payments and debt payments for telecommunications equipment necessary for the providing of cellular service in the Permit Area except for charges or costs to be paid by SYSCOM pursuant to Sections 2, 3, 4 and 6 hereunder.

d. Maintenance CELLCOM shall, with assistance from SYSCOM, negotiate and execute all contracts for maintenance and repairs in connection with the system. CELLCOM shall pay for all necessary and required maintenance and repairs on the cellular telecommunications system during the operation thereof, save and except for the services rendered by SYSCOM in the supervision and performance of system maintenance and repair as required by other provisions of this Management Agreement and the Maintenance Contract.

e. Technical Training CELLCOM shall pay all costs of technical training to be organized, implemented and arranged by SYSCOM pertinent to the MTSO (Mobile Telephone Switching Office) and associated cellular site equipment; however, SYSCOM shall utilize, if feasible, sales training, personnel and material furnished by cellular system equipment suppliers. All training hereunder shall be approved in writing by CELLCOM and shall be held in Utah, unless otherwise agreed to by both parties to this Management Agreement.

f. Access to Cellular System CELLCOM shall provide SYSCOM ten 10) numbers for SYSCOM's use ~~in the performance of its obligations under~~ this Management Agreement, SYSCOM shall pay all costs associated with such ~~ten (10)~~ numbers except local airtime and local access charges. SYSCOM ~~shall not~~ sell, lease or ~~otherwise~~ derive any revenue from the use of said en (10) numbers.

g. System Equipment Acquisition or Lease CELLCOM shall acquire y purchase or lease the equipment necessary to implement operations of the onwireline cellular telecommunications system in the PERMIT AREA and such quipment shall be made available to SYSCOM for its use in the performance f its obligations under this Management Agreement and subsequent

6. COMPENSATION

a. As compensation for full and proper compliance with the terms of this Management Agreement, SYSCOM shall be entitled to the following:

(1) A Service Fee to be paid via monthly payments of $10,000.00 payable on the 15th day of each month during the term of this Management Agreement.

(2) Ten (10) percent of revenues from the system, after deduction of all federal, state and local taxes due and owing, which sum shall be paid on the 15th day of each month, and cover the entire prior calendar month.

(3) In the event that CELLCOM enters into an agreement to sell the Utah 5 cellular system or any part thereof, CELLCOM agrees to pay to SYSCOM 5 (five) percent of the sales price in accordance with the following procedure. If CELLCOM receives the full sales price in cash at closing, SYSCOM shall be paid 5 (five) percent of that amount 15 days after closing. If CELLCOM receives less than the full sales price in cash at closing, SYSCOM shall be paid 5 (five) percent of the cash amount paid to CELLCOM at closing within 15 days of that initial payment. Thereafter as CELLCOM receives subsequent cash installments of the sales price, SYSCOM shall receive its 5 (five) percent share of those payments, within 15 days of receipt thereof by CELLCOM. In the event that CELLCOM enters into a sale in which cash will not be received from the buyer (i.e. a trade of cellular interest) either at the initial closing or in subsequent installments, then SYSCOM shall receive 5 (five) percent of the market value (as defined in Section 24) of the consideration received by CELLCOM, within 15 days of the closing of that transaction.

(4) Section a(1) and a(2) above shall be adjusted as the cellular system is a start up business and no track record has been

established to accurately determine reasonable compensation. CELLCOM and SYSCOM both agree to an adjustment in compensation, if necessary, at three month intervals in 1990, 1991 and 1992.

(5) Each party shall reimburse the other for out-of-pocket expenses by such party which are the responsibility, under this Management Agreement, of the other party, and which expenses have been incurred at the request of the other party. Such reimbursement shall occur within ten (10) days following receipt of such invoices as supported by proof of payment.

7. COMPETITION

a. SYSCOM and CELLCOM recognize that SYSCOM is now operating a communications business that is not in direct competition with CELLCOM's business as presently permitted under the applicable statutes of the FCC and the State of Utah. CELLCOM and SYSCOM recognize that due to a change in the applicable statutes and rules, after the date of this Management Agreement, there may in the future be a possibility of competition between SYSCOM's present and future business opportunities and CELLCOM's present, expansion and future business opportunities made available by such changes or amendments to the present rules and statutes of the FCC and the State of Utah. In such event and due to the foregoing, the parties hereunder may come to be in competition. Should this transpire CELLCOM and SYSCOM shall, outside of this Management Agreement, make every effort to negotiate in good faith and consummate a separate agreement between them to cover such a competitive situation. The negotiations of such agreement shall not, directly or indirectly, interfere with, suspend, or correlate in any manner to the duties, responsibilities or contractual obligations of each party to the other as set forth in this Management Agreement.

8. CONFIDENTIAL INFORMATION; INCLUDING THIS MANAGEMENT AGREEMENT

Both parties recognize that in performing in accordance with this Management Agreement it will be necessary for each to become conversant with certain information regarding the business of the other that is not generally available or known to the public, or to potential or actual competitors, including but not limited to, information regarding the identity and individual needs of customers and prospective customers of CELLCOM and SYSCOM, trade secrets, confidential marketing techniques and certain other confidential information concerning the business affairs of both parties. Each party expressly recognizes and agrees that it would be unfair and irreparably damaging to the other were it to disclose and/or make use of such confidential information. Each party covenants and agrees that during the term of this Management Agreement, and for a period of one (1) year thereafter, whether termination is voluntary or involuntary, it will refrain from disclosing and/or making use of any such confidential information except as may be necessary in the performance of obligations hereunder or except for disclosures to counsel. The covenants in this section are in addition to any other restriction on the dissemination of confidential information, including this Management Agreement generally, which may be recognized under any applicable law. Accordingly, the allegations set forth in this paragraph shall survive for one (1) year the termination of the Management Agreement regardless of the basis for such termination.

9. GOVERNING LAW

This Management Agreement shall be interpreted according to the substantive laws of the State of Utah. SYSCOM and CELLCOM hereby agree to subject themselves to in personam jurisdiction in Utah. Any proceeding,

arbitration, or otherwise, brought to enforce or otherwise interpret this Management Agreement shall be instituted in the State of Utah.

10. TERMINATION

a. Termination by SYSCOM SYSCOM may terminate this Agreement under the following conditions:

(i) upon 10 days written notice to CELLCOM, if CELLCOM fails or refuses to pay any amount due and owing to SYSCOM under Section 6 hereof when due;

(ii) immediately following the making by CELLCOM of any general assignment for the benefit of creditors, commencement by CELLCOM of any case, proceeding, or other action seeking reorganization, arrangement, adjustment or composition of CELLCOM's debts under any law relating to bankruptcy, insolvency, or reorganization, or relief of debtors, or seeking appointment of a receiver, trustee, custodian, or other similar official for CELLCOM or for all or any substantial part of CELLCOM's property; or the commencement of any case, proceeding or other action against CELLCOM seeking to have any order for relief entered against CELLCOM or CELLCOM's debts under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors, or seeking appointment of a receiver, trustee, custodian, or other similar officials for CELLCOM or for all or any substantial part of the property of CELLCOM, and (A) CELLCOM shall, by any act or omission, indicate CELLCOM's consent to, approval of, or acquiescence in such case, proceeding, or action, or (B) such case, proceeding, or action results in the entry of an order for relief which is not fully stayed within seven (7) business days after the entry thereof, or (c) such case, proceeding, or action remains undismissed for a period of fifteen (15) days or more or is dismissed or suspended only pursuant to Section 305 of the Untied States Bankruptcy Code or any corresponding provision of any future United States bankruptcy law; or

(iii) upon 30 days written notice at SYSCOM's sole discretion.

b. Termination by CELLCOM CELLCOM may terminate this Management Agreement upon 10 days written notice to SYSCOM, under the following circumstances:

(i) the failure or refusal of SYSCOM to perform any material part of its duties hereunder and the continuance of such failure or refusal for more than 30 days following written notice from CELLCOM (unless such failure or refusal is

(ii) the willful misconduct, dishonesty, gross negligence or gross misconduct of SYSCOM;

(iii) with 30 days written notice at CELLCOM's sole discretion; or

(iv) the making by SYSCOM of any general assignment for the benefit of creditors, the commencement by SYSCOM of any case, proceeding, or other action seeking reorganization, arrangement, adjustment or composition of SYSCOM's debts under any law relating to bankruptcy, insolvency, or reorganization, or relief of debtors, or seeking appointment of a receiver, trustee, custodian, or the similar official for SYSCOM or for all or any substantial part of SYSCOM's property; or the commencement of any case, proceeding, or other action against SYSCOM seeking to have any order for relief entered against SYSCOM as debtor, or seeking reorganization, arrangement, adjustment, or composition of SYSCOM or SYSCOM's debts under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors, or seeking appointment of a receiver, trustee, custodian, or other similar official for SYSCOM or for all or any substantial part of the property of SYSCOM, and (A) SYSCOM shall, by any act or omission, indicate SYSCOM's consent to, approval of, or acquiescence in such case, proceeding, or action, or (B) such case, proceeding, or action results in the entry of an order for relief which is not fully stayed within seven (7) business days after the entry thereof, or (C) such case, proceeding, or action remains undismissed for a period of fifteen (15) days or more or is dismissed or suspended only pursuant to Section 305 of the United States Bankruptcy Code or any corresponding provision of any future United States bankruptcy law.

11. REPRESENTATIONS AND WARRANTIES OF CELLCOM

CELLCOM hereby represents and warrants to SYSCOM as follows:

a. Organization and Standing CELLCOM will be a corporation organized under the laws of the State of Delaware and will be duly qualified to do business in the State of Utah.

b. Power and Authority CELLCOM has full power and authority to construct and operate the nonwireline cellular radio system in the PERMIT AREA and to perform the terms of this Management Agreement.

c. Binding Agreement This Management Agreement constitutes a valid and binding agreement of CELLCOM enforceable in accordance with its

d. Documents CELLCOM will deliver to SYSCOM true, correct and complete copies of its Articles of Incorporation and By-Laws.

12. REPRESENTATIONS AND WARRANTIES OF SYSCOM

SYSCOM hereby represents and warrants to CELLCOM as follows:

a. Organization and Standing SYSCOM is a corporation duly organized and in good standing under the laws of the State of Utah.

b. Power and Authority SYSCOM has full corporate power and authority to execute, deliver and perform the terms of this Management Agreement. SYSCOM has taken all necessary and appropriate corporate action to authorize the execution, delivery and performance of this Management Agreement.

c. Binding Agreement This Management Agreement constitutes a valid and binding agreement of SYSCOM enforceable in accordance with its terms.

13. LIMITATION ON LIABILITY; INDEMNITY

Notwithstanding anything to the contrary in this Management Agreement, SYSCOM shall not be liable to CELLCOM for any loss of damage of any nature incurred or suffered by CELLCOM in any way relating to or arising out of the act or default of SYSCOM, or any employee of SYSCOM, in the purported performance or nonperformance of this Management Agreement or any part hereof, except loss or damage to CELLCOM caused by SYSCOM's willful act, willful default, gross negligence or gross misconduct under this Management Agreement to the extent to which the same is not recoverable by virtue of the insurance of CELLCOM. In no event shall SYSCOM be liable for CELLCOM's loss of profits and/or other consequential loss or damage, whether or not occasioned or caused by the act, default or negligence of SYSCOM, nor shall SYSCOM be in any way liable for any act,

contractor employed for the purpose of providing services to CELLCOM. SYSCOM undertakes to use due care in the context of the available labor force in the selection of persons, if any, hired for the purpose of providing services to CELLCOM, but SYSCOM shall have no obligation, responsibility or liability of any nature whatsoever for any act or omission, tortuous or otherwise, of any person so hired. Except as otherwise set forth above, SYSCOM shall not be liable for, and CELLCOM shall indemnify and hold SYSCOM harmless from and against, any and all damages, liabilities, losses, claims, actions, suits, proceedings, costs or expenses (including reasonable billed attorneys' fees and expenses) of whatever kind and nature imposed on, incurred by or asserted against SYSCOM in any way relating to or arising out of this Management Agreement or the design, development, construction, operation or management of the nonwireline cellular radio system in the PERMIT AREA.

14. DISPUTE RESOLUTION

All disputes in connection with this Management Agreement shall be settled by means of mandatory binding arbitration, specifying the noticing party's appointed arbitrator, designating with particularity the facts supporting the demand for arbitration and constituting the alleged breach, the legal basis thereof and the relief requested. Such notice shall be personally served on the other party. The other party, upon receipt of such notice of termination, serve on the initiating party a response to the notice of arbitration and shall also appoint and designate an arbitrator. Within thirty (30) days after the designation of the two (2) arbitrators above stated, the two (2) arbitrators shall meet and agree on a third arbitrator. Unless otherwise agreed, the three (3) arbitrators shall attempt to agree on a third arbitrator who has experience in the

telecommunications industry. All costs of arbitration and reasonable billed attorney's fees shall be paid by the nonprevailing party.

15. CONTROL AND AUTHORITY

a. Nothing contained in this Management Agreement shall be deemed to constitute a surrender or transfer of control by CELLCOM of the right to operate the Utah 5 Cellular System. Notwithstanding anything to the contrary in this Management Agreement, CELLCOM shall have the sole and exclusive right to set rates or the cellular service to be provided and to exercise final authority over all decisions concerning the construction, operation and maintenance of the cellular system in the PERMIT AREA.

b. No persons working in furtherance of the performance of SYSCOM's duties hereunder shall be the employees of CELLCOM. All such persons shall be SYSCOM's employees, representatives, consultants or agents.

16. SPECIFIC PERFORMANCE AS AN ADDITIONAL AND/OR ALTERNATIVE REMEDY

In addition to any other remedies available in law or equity to the parties in arbitration, the parties may have the right to enforce the decision of the arbitration panel or any other decision of competent authority through specific performance as an alternative and/or additional remedy, both parties recognizing that the unique services contemplated pursuant to this Management Agreement demand the availability of such remedy.

17. NOTICES

All notices, demands, requests, offers or responses permitted or required hereunder shall be deemed sufficient if mailed by registered or certified mail or by reputable overnight delivery services, postage prepaid, addressed as follows:

To SYSCOM:

Neal M. Sorensen
President
Systems Communication Corporation
P. O. Box 1818
Vernal, Utah 84078

And to:

SYSCOM's designated counsel:

Michael F. Morrone, Esquire
Keller and Heckman
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036

To CELLCOM:

Dennis L. O'Neill
President
261 Hannover Circle
Panama City, Florida 32404

And to:

CELLCOM's designated counsel:

James Ireland, Esquire
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

18. SEVERABILITY

The invalidity or unenforceability of any particular provision of this Management Agreement shall not affect the other provisions hereof and shall be construed in all respects as if such invalid or unenforceable provision were omitted, however, both parties shall use their best efforts to modify the offending provision to conform to the rules and regulations while preserving the essential benefits of this Management Agreement to

19. NO WAIVER OF DEFAULT

A failure by either party to take action on account of any default by the other party shall not constitute a waiver of any rights set forth in this Management Agreement as they relate to future performance under this Management Agreement.

20. SUCCESSORS

This Management Agreement shall be binding on and shall operate for the benefit of all parties hereto and their respective heirs, designees, assignees and successors in interest, including legal representatives. However, this Management Agreement shall not be assigned without the written consent of the Parties. Such consent shall not be unreasonably withheld.

21. HEADINGS

Paragraph headings are provided for convenience only and are not a part of this Management Agreement.

22. ASSIGNABILITY

CELLCOM may assign its rights and obligations under this Agreement by giving SYSCOM written notice of such assignment. Upon thirty (30) days' written notice to SYSCOM, CELLCOM may assign all of its rights, duties and obligations under this Agreement to an affiliate or subsidiary of CELLCOM, or any other entity in which CELLCOM has a contolling interest. Any other assignment may be made only with the prior written consent of the other party, which consent shall not be unreasonably withheld.

23. INTEGRATION

This Management Agreement contains all other agreements, whether written or oral, except for the lease referenced in Section 3a, the Sales Agent Agreement and the Maintenance Agreement. This Management Agreement

24. MARKET VALUE

At any time when it shall be necessary to determine the fair market value of the System, ~~the Buyer~~ and the ~~Seller~~ may by written agreement determine the fair market value. If the ~~Buyer~~ and the ~~Seller~~ are unwilling or unable to make such a determination within 5 business days after either party receives notice of the occurrence of any event requiring the determination of fair market value, then the ~~Buyer~~ and the ~~Seller~~ shall, within the 10 business days after the expiration of such 5 business day period, each select an appraiser satisfactory to it and within 3 business days after being approved, the two appraisers shall appoint a third appraiser. Within 3 business days after the third appraiser is selected, the Buyer and the Seller shall each advise the other in writing whether the three appraisers are satisfactory to them. If either party fails to advise the other within such 3 business day period that the appraisers are satisfactory, then the parties shall negotiate in good faith to agree on three mutually acceptable appraisers within 5 business days after expiration of such 3 day period.

Each appraiser shall have at least 3 years experience appraising cellular telephone systems. In arriving at the fair market value of the System, the appraisers shall use data collected from the sales of interests in cellular telephone systems in other United States markets having a population of comparable size to the market served by the System and which have occurred within the two year period. The System shall take into account relevant differences affecting value between the markets served by such systems and the market served by the System, and such factors as the amount of debt assumed by the purchaser of any such system, the amount of the System's cash on hand, its account receivable and payable, and

market for cellular telephone systems serving rural service areas. The fair-market value of the System shall be determined by disregarding the appraisal that deviates to the greatest extent from the two remaining appraisal's, and then averaging the two remaining appraisals. If the deviation among all three appraisals is the same amount, then all three appraisals shall be averaged, as the case may be, shall constitute the fair market value of the System and shall be final and binding on the parties.

25. COMPLIANCE WITH FCC RULES

Notwithstanding anything in this Management Agreement to the contrary, both Parties agree that if any provision shall be deemed to be inconsistent with or in violation of the FCC's rules, such provision shall be null and void. In such event, both Parties agree to use best efforts to modify the offending provision to conform to the FCC's rules while preserving the essential benefits of this Management Agreement to each party.

26. RELATED PARTIES

Either party may enter into any reasonable agreement with a related party or affiliate for the performance of services of the acquisition of equipment or other property; however, each such agreement shall be on terms no less favorable to the other party than could readily be obtained if it were made with a person who is not the related person or affiliate or partner of the other party.

CELLULAR COMMUNICATIONS OF
EASTERN UTAH, INC.

By: Dennis L O'Neill
Dennis L. O'Neill
President

SYSTEMS COMMUNICATION
CORPORATION

By: _____
Neal M. Sorensen
President

# ADDENDUM NO. 2

# SEPTEMBER 18, 1995 RULING; FINDINGS OF FACT & CONCLUSIONS OF LAW

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH
SEP 19 1995
BY SHANA WITBECK, CLERK
DEPUTY

EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH
VERNAL DEPARTMENT

| | | |
|---|---|---|
| AMERICAN RURAL CELLULAR, INC. a Delaware Corporation | : | RULING |
| Plaintiff, | : | |
| vs. | : | |
| SYSTEMS COMMUNICATION CORPORATION, a Utah Corporation, and NEAL M. SORSENSEN, an Individual, | : | Case No. 910800064 CN |
| Defendants. | : | |

The above-captioned matter came regularly before the Court for Trial October 15th & 16th, 1992. After hearing evidence and arguments of counsel, the Court made and entered its Findings of Fact and Conclusions of Law and entered a Judgment on Defendant's Counterclaim for $116,040.96. The Plaintiff appealed to the Utah Court of Appeals. The Appellate Court analyzed the case and remanded for express findings;

1. The Trial Court was directed to make express findings on the crucial threshold issue of whether SYSCOM was a contractor under the Building Trades Act.

2. The Court of Appeals also made direction for a factual finding of which charges would be lienable and which charges would be payable under the management agreement in the event the Court determined Syscom was acting as a contractor, did not fit any of the exceptions to the licensing statute and accordingly there were direction to make findings regarding the allocation of attorneys fees.

This Court has carefully reviewed the transcript and the Court's own notes concerning the evidence adduced at trial and now makes and enters the following:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Syscom was not a contractor under the Licensing Statute. The record in this case clearly forms a basis for the Court's finding that Syscom was a participant in the permit company and not a contractor. In some instances, particularly relating to the actual physical construction, Syscom acted as an agent of the Plaintiff. References in the record are to the record of proceedings on appeal. The Defendant, Syscom, arranged the financing (found Motorola) pages 764 and 765. Defendant completed the interface with US West Communications, pages 775 and 776. Defendant did the electrical and telephonic systems engineering to get the complete system up and running. Defendant did whatever was necessary with Plaintiff's blessing assuming the complete permit company was online.

2. The Defendant, Syscom, was to share in sales and was to be involved in the operation and maintenance after completion and operation of business. The Defendant also constructed the buildings, obtained permits, and acted in the physical construction as an agent of the Plaintiff.

3. Neal Sorensen testified that he was excited about being in the cellular business and that O'Neal of American Rural Cellular sought Syscom out because they were in the radio and telephone business. Conceptually, it is important to note that Syscom became involved and acted with due diligence to help the Plaintiff get the company online. It would appear from the record, that Plaintiff had the winning lottery ticket and was under guidelines to complete the system and get it up and running within specified time frames.

4. The work of putting together the cellular telephone company progressed and eventually, as the initial phase of setting up the cellular telephone system was nearing completion, one version of a Management Agreement was signed by Plaintiff and another was signed by Defendant. The parties went forward with the work as if they had agreed to the terms embodied in the Management Agreement. (T. 244-245, 247, 280-282).

5. Under the terms of the Management Agreement, Syscom had the responsibility to, "manage and implement the building of the system and operating it once built". Those responsibilities included operating, servicing, and maintaining all of the towers, switches, terminals, and other facilities, sales and billing of customers, negotiating interconnections, arrangements with local wireline telephone systems, establishing written operating procedures, and selecting, training, and supervising technical sales and administrative personnel and many other duties. (T. 248-251, Ex. 1 and 75).

6. For performing these functions, ARC agreed to pay Syscom a "service fee" of $10,000 per month plus 10% of the revenues from the system, minus certain deductions for taxes. The $10,000 per month management fee, although not called that by the parties, was substantially a fee for radio and telephone engineering and management services (T. 127, 240-241, Ex. 1 and 75).

7. Although the Management Agreement states that Syscom is an independent contractor, the agreement also states that Cellcom had the right to make all decisions and direct how the work was done in putting together and operating the telephone company. The parties' actions indicate their recognition that ARC was in total control and could direct, and at times did direct, how work was to be performed and how the money was spent. (T. 133, 134). For example, communications about the details of the work took place nearly daily as the work progressed and ARC directed Syscom to withdraw monies and send the money to ARC in Florida, which Syscom did in a sum of $118,156.60. (T 39, 85, 105, 115-116, 244, 254, 269-273, Ex. 1 and 75).

8. Part of the money to be received by Syscom was Ten (10%) percent of gross revenue and in the event the cellular telephone system sold, Syscom is to receive five (5%) percent of the sales price. (T. 128, 247, Ex. 1 and 75).

9. As Syscom went to work to put together the telephone company, Neal Sorensen and Marie Bagshaw, the contact person Syscom had with Arc, talked on the telephone three or four times a week, if not more often. (T. 85, 244).

10. Syscom was to be paid a fee called a service fee for its work in creating the new telephone company, which fee was the same during the construction period and the operation period. (T. 122), (Ex. 1 and 75).

11. Plaintiff breached its covenant of good faith dealing by ceasing to communicate with the Defendant when Defendant was attempting to finish the cell sites and operate the system. This failure to communicate commenced several months prior to the termination of the agreement by Plaintiff. (T. 51, 86-87, 299-301).

12. Defendant breached the agreement by advertising a competing product, however, paragraph seven of the Management Agreement recognized that there would be some conflict between Systems Communications' existing radio business and the cellular business and entered into the agreement with this knowledge and expressed reference to that potential problem. The Court finds the breach to be minor. (T. 276-278, Ex. 1 and 75).

13. The Defendant, Systems Communication Corporation, sincerely pursued the construction and management of the system in anticipation of and reliance on future expectations of profit. (T. 247).

14. The Plaintiff, American Rural Cellular, Inc., received a completed and developed system at a reasonable price and was satisfied with the product. (T. 101, 106, 143).

15. The Sales Agency Agreement signed by the parties enabled Syscom to participate in the sale of cellular telephones and states that it would do so as an independent contractor. (ex. 23).

16. Plaintiff was satisfied with how the buildings and towers were constructed. (T. 106). Plaintiff and its engineers supervised SYSCOM and approved the disbursement of funds from the various accounts. (Ex. 1 and 75).

17. The services performed by Defendant, Systems Communication Corporation, improved the liened properties and were reasonable. The charges for work performed both by outside contractors and employees of Systems Communication Corporation are properly chargeable against Plaintiff, in addition to the $10,000 per month agreed upon service fee> (T. 240-241).

18. There is owing to Systems communication by Plaintiff, the sum of $31,543.33 for work it did and hired performed and materials supplied for improvements on the property covered by the lien identified in the First Cause of Action. (T. 306), (Ex. 76).

19. Three is owing to System Communications by Plaintiff, the sum of $23,136.17 for work it did and hired performed and materials supplied for improvements on the property covered by the lien identified in the Second Cause of Action. (T. 306), (Ex. 76).

20. There is owing to System Communications by Plaintiff, the sum of $16,439.33 for work it did and hired performed and materials supplied for improvements on the property covered by the lien identified in the Third Cause of Action. (T. 306), (Ex. 76).

21. The agreements between the parties included a provision that in the event of default that the defaulting party would pay the costs of enforcement including reasonable attorneys fees. (T. 325), (Ex. 1, 23, and 75).

22. Defendant has been required to hire an attorney and to pursue its counterclaim in this matter in enforcing Plaintiff's obligation to make the payments it agreed to make under that agreement. (T. 325-327).

23. A reasonable fee to be awarded Defendant work related to the lien foreclosure is $15,000.00.

24. Since the Court has expressly found that SYSCOM was not acting as a contractor, the Mechanic's Lien Statutes are not and were not relevant to this action (other than to secure Syscom's position as a tactical matter up front).

25. Pre-Judgment interest is and should be allowable on the definite amounts determined.

26. SYSCOM's attorneys fees are chargeable under the Management Agreement and the contract under which the parties operated as the Court finds that SYSCOM was "the most prevailing party" and is therefore entitled to attorneys fees and costs through the course of the Appeal.

27. Based upon the record at trial, the Court expressly finds that SYSCOM's services performed were reasonable and outside and/or inside contract employee man hours were properly chargeable in addition to the service fees. The prior Memorandum of the Court insofar as the Findings and Conclusions are not inconsistent herewith are incorporated and the Court concludes, therefore, that SYSCOM is entitled to Judgment against American Rural Cellular as follows: First Claim $31,543.33; Second Claim $23,136.17; Third Claim $16,439.33; Commissions $2,376.92; Attorneys fees entire proceedings through the date of Appeal $15,000; Attorneys fees and costs incurred on Appeal and Post Appeal $22,744.76; Pre-Judgment Interest $39,913.05 for a Total Judgment in the amount of $151.153.56.

DATED this 18 day of September, 1995.

BY THE COURT:

JOHN R. ANDERSON, DISTRICT COURT JUDGE

## MAILING CERTIFICATE

I hereby certify that on the 19th day of September, 1995, true and correct copies of the Ruling were mailed, postage prepaid, or hand delivered to: Mr. Andrew Morse, Attorney for Plaintiff, at SNOW CHRISTENSEN & MARTINEAU, 10 Exchange Place, #1100, Salt Lake City, UT 84111 and to Mr. Gayle F. McKeachnie, Attorney for Defendants, at 121 West Main Street, Vernal, UT 84078.

Deputy Clerk

# ADDENDUM NO. 3

# RULING DENYING RULE 59 MOTIONS AND MOTION TO RECUSE

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH
NOV 13 1995
BY SHANA WITBECK, CLERK
DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| AMERICAN RURAL CELLULAR, INC., a Delaware Corporation, | : | **RULING** |
| Plaintiff, | : | |
| vs. | : | |
| SYSTEMS COMMUNICATION CORPORATION, a Utah corporation, and NEAL M. SORENSEN, an individual, | : | Case No.: 910800064 CN |
| Defendants. | : | |

The Court entered its Findings in accordance with directions from the Court of Appeals in this matter on September 18, 1995. The Court further requested counsel for the parties to submit proposed Findings of Fact and Conclusions of Law and Judgment and has received various Motions from the Plaintiff who is unhappy about the Court's Ruling. The Court has carefully read the Motions, the Memorandums supporting the Motions, the Responsive Memoranda filed by the Defendant and additional Responsive Memoranda filed by the Plaintiff. The Court is now in a position to enter its final Ruling regarding this matter and will deal with the Motions in the order in which they were filed.

1. Plaintiff's Motion for New Trial filed September 29, 1995

The Court is of the opinion that Utah Rules of Civil Procedure Rule 59 criteria have not been met. There is no Affidavit supporting the basis for the Motion. The Court recognizes Plaintiff's counsel was not trial counsel. However, Plaintiff seems to be arguing with the Court's interpretation of conflicting evidence. Plaintiff is also arguing factual matters which were unrefuted at trial with facts they have learned through diligence subsequent to trial.

The Court was in a unique position to hear the evidence at the time of trial. That was the time for the case to be heard. There is adequate evidence in the trial record to support the Court's Findings and subsequent Findings of September 18, 1995. For example, Neal Sorensen testified that he was excited about the cellular business (citations are to the Appellate record, 767), and that. . . ."Syscom was to manage and implement all business activities for the business operation (768)."

Defendant arranged the financing (found Motorola) (764, 765 ). Defendant completed the interface with U.S. West (775, 776). Defendant made decisions about locating and serving the sites (762, 763). The only witness for Plaintiff, Marie Bagshaw, did not dispute those factual assertions at the time of trial. Plaintiff sued to rescind the agreement. Defendants anticipated future profits were to be lost if Plaintiff prevail. Plaintiff's counsel now wants to argue facts, later discovered through information obtained from his own client that are in dispute but not brought out at trial. The trial of this case took two days and is over. Plaintiff's Motion to Reopen is denied. Request for Oral Argument is denied.

2. Plaintiff's Motion to Reconsider Ruling Precluding Responsive Memoranda or Oral Argument on Proposed Findings filed October 11, 1995

The Trial Court has broad discretion to control the proceedings and procedure before it. The Court could have made specific findings as directed by the Court of Appeals without any input from the parties. At the conclusion of the hearing determining whether there had been a settlement, the Court outlined, with consent of the parties, the simultaneous submission of Proposed Findings of Fact and Conclusions of Law. The Court considered those in its analysis and made its specific Ruling on September 18, 1995. In the Court's analysis the specific references were made to the record. the Court is of the opinion that there is substantial preponderant evidence in the record to support the Court's Findings both before and after the Appeal. Plaintiff's Motion to Reconsider Ruling and for Oral Argument on Proposed Findings is denied.

3. Plaintiff's Objection to Findings of Fact and Conclusions of Law filed October 12, 1995 and Request for Oral Argument

For the reasons outlined in the Court's analysis of the first two Motions further extensive comment is unnecessary. The Court again is of the opinion that there is ample preponderant evidence in the record to support the Findings of Fact and additional Findings entered by the Court on September 18, 1995 all according to the instructions of the Court of Appeals. Plaintiff's objections to the Findings are denied. Request for Oral Argument is denied.

4. Plaintiff's Motion to Disqualify Judge

While the Court is sensitive about the appearance of impropriety, the Court can't condone the untimely way the Plaintiff kept this knowledge under its hat until things began to go badly for it. Since the Plaintiff kept his hole card hidden so long, he can't now play it. The Court is of the opinion that the Motion to Disqualify need not be supported by an Affidavit under Rule 63 under this situation.

The Court is of the opinion, however, that the appearance of impropriety disqualification is in fact waiveable and in situations where the Court has prior knowledge of the appearance should make a record stating the facts known to the Court to allow the parties to discuss the matter and waive a recusal on the record. In this situation, the Court had no knowledge of any facts later learned regarding the law firm's handling of the Escrow transaction. It seems apparent to the Court, however, that the Motion to Disqualify should be made at the time counsel became aware of or learned of the facts leading to the disqualification. I think the Madsen vs. Prudential Federal Savings and Loan Association case is controlling.
767 P.2d 538 (Utah 1988).

Counsel for Plaintiff apparently had knowledge of the Beaslin and Anderson Escrow function in July, 1995. In all good sense, Plaintiff waited to play this card until it had an unfavorable Ruling. Plaintiff's Motion was not filed with knowledge of facts until after it had participated in a Motion and hearing to enforce a settlement agreement, prepared and filed its proposed Findings of Facts and Conclusions of Law, filed a Motion to Reconsider, filed a Motion for a New Trial, and Motion to Reopen the Case for further Fact Presentation. Almost 90 days had elapsed. Plaintiff's Motion to Disqualify Judge is denied. Request for Oral Argument is denied. The Court is of the opinion this is a borderline chicken shit Motion but because of the sensitive nature of the Motion, the Court will not award attorney fees.

5. Plaintiff's Motion to Disqualify McKeachnie and Allred

The facts presented to the Court in the Memoranda submitted indicate no attorney/client relationship. There does not appear to be a conflict from the disclosures that were made and the Motion is not timely. Once again, presumably the Plaintiff's, Mr. O'Neil and Ms. Bagshaw, knew well of the communication made with Mr. McKeachnie's office. The Court feels that there was in fact no attorney/client relationship and therefore no conflict. The Court is disturbed again in this situation that Plaintiffs waited until they lost to raise the question. Motion to Disqualify McKeachnie and Allred's Law Firm is denied. Request for Oral Argument is denied. The Court will award $1,000 attorney fees to

Defendants on this Motion if the time involved can be supported by Affidavit.

From the Court's Ruling herein, the Court will now make, enter, and sign the Findings of Fact and Conclusions of Law and Judgment heretofore submitted, and they are entered and filed herewith.

DATED this 9th day of November, 1995.

BY THE COURT:

JOHN R. ANDERSON, DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 9th day of November, 1995, true and correct copies of the Ruling were mailed, postage prepaid, or hand delivered to Mr. Andrew M. Morse and Julianne P. Blanch, Attorneys for Plaintiff, at SNOW, CHRISTENSEN, & MARTINEAU, 10 Exchange Place, Eleventh Floor, P.O. Box 45000, Salt Lake City, UT 84145-5000 and to Mr. Gayle F. McKeachnie, Attorney for Defendants, at 121 West Main Street, Vernal, UT 84078.

Deputy Clerk

# ADDENDUM NO. 4

# TRANSCRIPT OF COURT'S ORAL DECISION WITH REGARD TO RECUSAL

RECEIVED
APR 15 1996
8th District Court

IN THE EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR UINTAH COUNTY, STATE OF UTAH

FILED
Utah Court of Appeals
JUL 16 1996
Marilyn M. Branch
Clerk of the Court

-oOo-

AMERICAN RURAL CELLULAR, INC.,

Plaintiff,

vs.

SYSTEMS COMMUNICATION,

Defendant.

Civil No. 910800064CN

Motion Hearing

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH
APR 15 1996
SHANA WIDDISON, CLERK
BY _____ DEPUTY

-oOo-

BE IT REMEMBERED THAT on the 28th day of February, 1996, the above-entitled motion hearing was held in the above-named court in and for the State of Utah, Eighth Judicial District Court, 147 East Main, City of Vernal, State of Utah.

That said proceedings were recorded by audio tape and hereinafter transcribed by Kathy H. Morgan, a Certified Court Reporter and Notary Public in and for the States of Utah and Nevada, License Nos. 7801 and 357, respectively.

FILED
Utah Court of Appeals
JUL 16 1996
Marilyn M. Branch
Clerk of the Court

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discuss the legal ramifications of those facts, even if they were true and even if they were introduced at trial, it is indeed too late to come up with that. Even if it was not too late to come up with it, there's no evidence to support it. And as Gayle recognized, this appeal bond issue is indeed premature. I suggest we simply go by the rules on approaching that issue.

Thank you, your Honor.

THE COURT: Thank you.

I appreciate the way this matter's been argued, counsel. I suppose the first thing we need to do is deal with the recusal issue. I suppose if I find that I should recuse, probably I'm not in a position to rule on anything else.

I allowed oral argument and the opportunity to give counsel full opportunity to be heard on that issue because I am concerned as a Court with that issue. I'm very sensitive about that issue, and I've indicated all along I have been somewhat distressed by how to deal with it.

The Court has taken a good look at that. I have looked at some ethics opinions and I've tried to analyze it in terms of, first of all, I guess in a gray area where there's an appearance of -- an

appearance of -- impropriety, the Court should back out. The Court should always disclose that and talk to the parties about it. And I acknowledge that responsibility.

I will also indicate that I have no knowledge about any involvement. Mr. Morse has talked about involvement, and I guess as I read the rules under the canons, the canons in the statute refer to the appearance of impropriety as relating to associations that are connected to the matters in controversy.

As I read the Code of Judicial Conduct, canon 3, subpart E 1(b), it clearly talks about matters in controversy. Subsection F of that canon talks about where the Court has knowledge, and asks the parties about it or makes a disclosure, and the parties can waive it after consultation with their clients out of earshot of a judge that seemed to convince me that it is waivable.

I appreciate the arguments of counsel, and in rereading the Madsen case, there are some things in that case, I think, that apply by implication, and some things that don't. If you also read the Scott case, the federal case cited by the plaintiff, there is a situation where the judge had an ongoing

discussion with the Department of Justice about becoming employed with them.

Let's take a look at the actual facts of what we have before us here. Counsel's noted at I guess one of the motions, one of the settlement argument motions, an exhibit was introduced which contained the escrow agreement. Apparently Mr. Allred of Mr. McKeachnie's office had drafted an escrow agreement between SysCom and Neal Sorensen. There was a paragraph in that agreement which named the law firm of Beaslin & Anderson. Frankly, the Court looked at the document the day it was introduced and didn't even make the connection then. Let's look at exactly what it was that Beaslin & Anderson was to have done. What was the connection? What was the relationship?

I suppose first we can all agree that it was not the matter in controversy. There was reference in the agreement to this litigation, allocation of who was to pay for that and how the proceeds were to be divided between Sorensen and SysCom if the litigation was successful.

But I think Beaslin acted in that case, and again absolutely I had no knowledge of this, and not even the day I read the document did a flag raise. What was Beaslin called on to do here? I

don't think he had a -- it was kind of like an escrow. He took the money; if the parties performed he was to deliver the stock.

I don't know if that's the kind of involvement that contemplates the same kind of things that were wrong in Scott versus U.S. Seems to me Beaslin was acting as a fiduciary under that agreement drafted by other attorneys to simply do what the agreement provided, and it was no different than if it had been placed with a title company or a bank. I think Beaslin had a fiduciary duty to both parties; that the parties involved were SysCom and Sorensen. Had nothing to do with the matter in controversy before me.

Even at that, and I guess the Court of Appeals is going to tell us, I'm of the opinion that that kind, that kind of an involvement, although it may create an appearance of impropriety, is of a nexus that would probably, I think, be waivable where the objection was raised so late in the proceedings.

And Mr. Morse, I appreciate the fact that you didn't have a fast way to determine the information. I have suffered and dealt with this concept. I have previously ruled, and I apologize for my coarse, my country judge kind of language in that

ruling. But it seems to me that the fact, the motion was raised solely in these proceedings, but so much has gone before in these proceedings that it is waivable in this case, and that I don't think Scott versus U.S. applies.

By the way, there's very little case law, and I'll note for the record that the federal rules and state rules are not identical. The judicial ethics rules are not the same in every state. So I guess this may be a case that the Court of Appeals may have to tell me that I was wrong.

I think the language in this footnote in the Madsen case is important, though. Here the Court is citing State versus Neeley. This is footnote 5 on page 544 of the Pacific Reporter in the Madsen case.

They tell us in close cases, disqualification is the favored course of action. However, disqualification is not automatic and the basis for disqualification should be thoroughly examined, especially in cases such as this which are at an advanced stage of the litigation process. And here they were talking about an allegation of bias and prejudice and not an appearance.

Although the language there talks about -- and this is the language of the Court. It says: "An

appearance of bias or prejudice is sufficient for disqualification; but even disqualification because of appearance must have some basis in fact and be granted on more than mere conjecture and speculation."

I think, counsel, that I'm going to rule that the motion to disqualify because of the appearance in this case, first because of the nature of the Beaslin relationship, and second because of the lateness of the time in which it was filed, are not going to be grounds for me for disqualify. And so I'm going to indicate that I'll rule in the defendant's favor on that.

I think the statute, 78-7-1, that's cited also by implication talks about the prior association or the prior law firm association, the involvement being relating to the matter in controversy. I think the best course of action would be, obviously, and I think those are -- and I think it's clear those are automatic. Those are just totally automatic. And the judge ought to know and the parties ought to know and everybody ought to know about that up front.

Let me respond, Mr. Morse, to the rest of the arguments and the Rule 59 motions. I appreciate the fact that evidence you have discovered after the trial caused your client great distress, and you feel

like you haven't had your day in court. You're mad about this, and I understand that. Where was all this stuff when we tried the case? I just have to say that the Rule 59 motion seems to me as based, and you're basing that on newly-discovered evidence which you couldn't discover through reasonable diligence prior to trial, Mr. McKeachnie has I think adequately pointed out that there were depositions, there was discovery. We tried the case in October, the case took two days, and these facts simply were not developed or presented in the record.

Your Rule 59 motion and what you've told me here today, you take dispute with a lot of the findings. You take dispute or you talk about a lot of new issues. And I've gone back in your motion, your written motion, and gotten the transcript and read my notes, and I've read some of the record. And from what I heard at the trial, the record, I think, clearly supports the findings that I have made.

There's direct testimony from Neal Sorensen that he was the finder of Motorola. He said he brought Motorola to this deal. Nobody refuted that. Ms. Bagshaw didn't refute it. And I can only decide these cases based on the evidence that's before me. If those facts were not developed at trial, they